

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

GLORIA SCOTT AND *
DEANIA JACKSON *
* NO. 96-8461
VERSUS * DIVISION "I"
* SECTION 14
THE AMERICAN TOBACCO *
COMPANY, INC., ET AL. *
*
* * * * *

Transcript of proceedings before The
Honorable Richard J. Ganucheau, Judge Pro Tempore,
Civil District Court, Parish of Orleans, State of
Louisiana, 421 Loyola Avenue, New Orleans, Louisiana
70112, commencing on June 18, 2001.

* * * * *
Tuesday Afternoon Session
April 8, 2003
1:35 p.m.
* * * * *

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18175

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18178

I N D E X

WITNESS: PAGE

SAMUEL V. SPAGNOLO, M.D., FACP, FCCP

CROSS-EXAMINATION
BY MR. MICHAEL GERTLER.....18179

REDIRECT EXAMINATION
BY MR. LONG.....18277

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18179

P R O C E E D I N G S

(Whereupon the jury joins the proceedings at this time.)

THE LAW CLERK:

All rise. Recess is over. Court will come to order.

THE COURT:

Please be seated.

Mr. Gertler, you may proceed.

MR. MICHAEL GERTLER:

Thank you, Your Honor.

Your Honor, at the break, we had on the screen Exhibit Number 0092.04.

And I would ask that it be republished,
Your Honor, please.

THE COURT:

Yes, my notes indicate there's no objection. And you may publish it.

CROSS-EXAMINATION

20 BY MR. MICHAEL GERTLER:
21 Q. Dr. Spagnolo, you see on that document the
22 reference to the "IAPAG, I-A-P-A-G, "Scientist
23 Activities."
24 I'm going to ask Carl to now display to the
25 jury the entire document. And highlight, will you,
26 Carl, the last part of the document that begins with
27 "The score for the others...." and it lists names.
28 And please enlarge that.
29 Dr. Spagnolo, you see your name on that
30 document?
31 A. Well, it's not actually my name. It's
32 misspelled. But I presume that it's me.
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18180
1 Q. Now, Dr. Spagnolo, you had the opportunity to
2 have a nice lunch break; didn't you? You had an
3 hour and a half at lunch. During that hour and a
4 half, Doctor, did you have an opportunity to think
5 about what IAPAG was doing at the time your name was
6 listed on that document?
7 A. I didn't think about it very long, no.
8 Q. Well, did you think about it long enough that
9 you can tell this jury what the function of that
10 organization was?
11 A. I have no idea.
12 Q. Now, Doctor, tell this jury whether you
13 discussed that with any of the attorneys for the
14 cigarette companies at lunch.
15 A. What? This document?
16 Q. Yes, IAPAG, I-A-P-A-G.
17 A. They may have asked me if I knew much about
18 IAPAG, that's about all.
19 Q. They may have asked you or they did?
20 A. Yeah, I think they said, "Do you know what
21 IAPAG was?"
22 Q. Yes.
23 And you told them what, Doctor?
24 A. I told them I don't know for sure what IAPAG
25 is.
26 Q. So you're telling this jury that you have no
27 memory one way or the other about this organization
28 called IAPAG; correct?
29 A. Well, I know some of the people whose names
30 are listed here.
31 Q. Those are the people at Georgetown?
32 A. Well, I don't know where they are now. I
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18181
1 know that Dr. Witorsch is at Georgetown.
2 Q. And you know that Dr. Witorsch was consulting
3 for IAPAG; correct?
4 A. Well, I'm not sure about IAPAG. Dr. Witorsch
5 had his own corporation, so he may have been
6 consulting with lots of people.
7 Q. Do you know what the "3" next to your name
8 indicates on that document?
9 A. The next three names?
10 Q. Yes. It says, "Spagnola (3)," the number 3,
11 after your name.
12 A. Not for sure.

13 Q. Well, let me see if I can try to refresh your
14 memory, Doctor.
15 Do you recall attending a scientific meeting
16 on April the 12th, 1986 at the University of
17 Maryland, Lung Cancer Symposium, Baltimore,
18 Maryland?
19 A. What year was that?
20 Q. That was 1986, April the 12th.
21 A. No, I have -- I have no immediate
22 recollection of that meeting.
23 Q. You mean you can't even tell this jury today
24 whether or not you attended that meeting or didn't
25 attend that meeting?
26 A. I'm not saying I did or didn't. I'm just
27 saying it's a long time ago and I go to a lot of
28 meetings, so maybe I was there.
29 Q. Well, if you were there at that meeting, Dr.
30 Spagnolo, weren't you there at the request of IAPAG?
31 A. I have no idea.
32 Q. You're not denying that; are you, sir?
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18182

1 A. No, I'm not denying it.
2 Q. Now, sir, do you remember being at a meeting
3 on May the 11th through the 14th in Kansas City,
4 Missouri, a scientific meeting?
5 A. What year was that?
6 Q. 1986, sir.
7 A. All I can tell you is I go to a lot of
8 meetings. And I don't remember if I was at a
9 meeting in 1986.
10 Q. Well, here's why it might stick in your
11 brain, Doctor. Because if you attended that
12 meeting, you attended it on behalf of IAPAG, the
13 Indoor Air Pollution Advisory Group.
14 Are you denying that?
15 A. I don't remember the meeting. If you could
16 tell me the name of the meeting, maybe I could
17 remember the name of the meeting.
18 Q. Well, let me ask you this. And I will put
19 this up next, Doctor. Did you attend a meeting of
20 all IAPAG members in [DELETED] where you live
21 on May the 8th through the 9th?
22 A. When?
23 Q. 1986. With reference to that document, sir.
24 A. I have no recollection of that meeting. What
25 was the name of that meeting?
26 Q. Well, let's see if we can help refresh your
27 memory, Doctor.
28 I ask now, Your Honor, please, for Carl to
29 put Scott Exhibit 0116.04 on counsel's screen and
30 The Court's.
31 Do you see it, Doctor? Do you see that
32 document?
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18183

1 A. Yes, sir, I do.
2 Q. Do you see the title of that document?
3 A. Yes.
4 Q. What does it say, Doctor?
5 A. It says, "SCIENTIFIC WITNESS APPEARANCES."

6 Q. And you see midway down on that page, "Indoor
7 Air Pollution Advisory Group"?
8 A. In parentheses.
9 Q. Now, turn, Doctor, three pages to Page 3
10 under "Scientific Meetings." April 12th, University
11 of Maryland, Lung Cancer Symposium, Baltimore,
12 Maryland, whose name is next to that, sir?
13 A. My name is there.
14 Q. Now, do you remember being there, sir?
15 A. No.
16 Q. You're not denying it; are you, sir?
17 A. No.
18 Q. Turn the page, sir.
19 A. It was a meeting about lung cancer.
20 Q. Does that help you remember?
21 A. No, I go to a lot of meetings about lung
22 cancer. No.
23 Q. Well, tell this jury what position you took
24 when you went to that meeting that had to do with
25 lung cancer.
26 A. I don't remember the meeting, so I probably
27 was sitting there listening to what was being
28 presented.
29 Q. Did you take a position at that meeting in
30 opposition to the Surgeon General of the United
31 States on smoking?
32 A. Not that I'm aware of.

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18184

1 Q. Look at the next meeting, Doctor, May 11th
2 through 14th, Kansas City, Missouri. Whose name is
3 next to that meeting?
4 A. My name.
5 Q. Do you remember that meeting, sir?
6 A. If you told me the name of the meeting, I
7 might remember it.
8 Q. Well, see, that's why you're here, Doctor.
9 Because I was able to get these documents, you
10 understand, in the fashion I got them.
11 MR. WITTMANN:
12 Objection, Your Honor.
13 MR. LONG:
14 Objection.
15 EXAMINATION BY MR. MICHAEL GERTLER:
16 Q. And I'm asking you if it refreshes your
17 memory?

18 THE COURT:
19 Just a moment, please. I have an
20 objection.
21 Mr. Wittmann, do you wish to approach
22 the bench?
23 MR. WITTMANN:
24 Yes, Your Honor.
25 (Whereupon a bench conference is held at
26 this time as follows:)
27 THE COURT:
28 Mr. Wittmann?
29 MR. WITTMANN:
30 This argumentative preamble is
31 unnecessary. He can ask a question. I think
32 it's an improper question.

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1 THE COURT:
2 It is.
3 MR. MICHAEL GERTLER:
4 He is under cross, Your Honor. I think
5 there's wide latitude and I'm trying to
6 refresh his memory, which he continues to
7 deny.
8 THE COURT:
9 You can do that.
10 The objection I hear is to the preface
11 to your question: "That's the reason you're
12 here, Doctor."
13 MR. MICHAEL GERTLER:
14 Oh, you mean the statement?
15 THE COURT:
16 That's the objection.
17 MR. MICHAEL GERTLER:
18 Okay. The objection is sustained.
19 Restate the question.
20 MR. MICHAEL GERTLER:
21 Okay.
22 (Whereupon the bench conference is
23 concluded at this time.)
24 THE COURT:
25 The objection to the form of the
26 question is sustained.
27 Please ask the witness a question, Mr.
28 Gertler.

29 EXAMINATION BY MR. MICHAEL GERTLER:

30 Q. Doctor, has this document helped you refresh
31 your memory at all with regard to your purpose for
32 attending these IAPAG meetings as indicated on this
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1 exhibit?
2 A. No, they haven't.
3 MR. MICHAEL GERTLER:
4 Carl, would you please put up on the
5 Judge's screen and on the counsel's screen
6 Scott Exhibit 0142.04.
7 EXAMINATION BY MR. MICHAEL GERTLER:
8 Q. Do you see that document, sir?
9 A. I see it. I haven't had time to read it.
10 Q. Take your time.
11 A. (Witness reviews document.) Okay.
12 Q. Doctor, do you recognize the person who this
13 document is addressed to?
14 A. I believe it's the same person who was on a
15 previous one.
16 Q. Who is that, Doctor?
17 A. I can't read it. My screen is too small.
18 Q. Oh, okay. Well, why don't I help you.
19 It says to Samuel D. Chilcote, Jr.; doesn't
20 it, Doctor?
21 A. Yes.
22 Q. That's the same person I had asked you about
23 previously, who is the President of The Tobacco
24 Institute; correct?
25 A. Yes, sir.
26 Q. Do you see a reference to IAPAG in this

27 document? Look in the first paragraph.
28 A. Yes, I do.
29 Q. What does this document indicate was the
30 function of IAPAG, sir?
31 A. Well, I'm not sure what the function of IAPAG
32 is. The Center for Environmental Health and Human
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18187

1 Toxicology is a company that Dr. Witorsch was
2 involved in, so I'm assuming that the IAPAG group or
3 committee or advisory committee was somehow related
4 to his corporation.

5 Q. What does this document indicate the function
6 of IAPAG was as it relates to The Tobacco Institute?

7 MR. WITTMANN:

8 Objection, Your Honor. May I approach?

9 THE COURT:

10 Yes.

11 (Whereupon a bench conference is held at
12 this time as follows:)

13 THE COURT:

14 Mr. Wittmann.

15 MR. WITTMANN:

16 The document is not in evidence, it's
17 not impeachment. I think it's improper to
18 ask a witness to start reading from a
19 document that you haven't offered.

20 THE COURT:

21 He didn't ask him to read from it. He
22 asked him a question about what is the
23 purpose of IAPAG from this document.

24 And if he knows the answer, he can
25 answer; if he doesn't know, he can't.

26 MR. WITTMANN:

27 He asked him from this document what is
28 the purpose.

29 THE COURT:

30 You may ask him what the document
31 indicates was the function of the
32 organization and --

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18188

1 MR. MICHAEL GERTLER:

2 I was going to lay a foundation. But I
3 can do it the other way, if you want me to.

4 THE COURT:

5 But as an objection to the question I
6 think it's an appropriate objection because
7 you asked him for information from the
8 document which is not in evidence.

9 Sustained.

10 MR. LONG:

11 I want to make an objection, too, for
12 the record, to keep from coming back up here,
13 if we continue about this IAPAG, the witness
14 has testified he doesn't recall it, doesn't
15 know what it was, doesn't remember anything
16 about it.

17 Under Rule 602, you can't inquire unless
18 you can establish personal knowledge of a
19 witness. He hasn't done that.

20 THE COURT:
21 And all he's got to say is "I don't
22 know" and that will be over.
23 MR. LONG:
24 But he says that, and then he puts a
25 document about which he lacks knowledge,
26 which is a 602 objection. He didn't say he's
27 ever seen this before. And then he tries to
28 say what does the document say about it?
29 That's not --
30 THE COURT:
31 And the objection has just been
32 sustained.

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18189

1 MR. LONG:
2 Okay. I'm just putting it on the record
3 because it's going to come up again.
4 (Whereupon the bench conference is
5 concluded at this time.)
6 THE COURT:
7 The objection to that last question is
8 sustained. Don't answer that question. The
9 next question, please, Mr. Gertler.
10 MR. MICHAEL GERTLER:
11 Your Honor, at this time I'd like
12 permission to publish 0142.04 and offer it
13 into evidence.
14 MR. WITTMANN:
15 Objection, Your Honor.
16 THE COURT:
17 Sustained.

18 EXAMINATION BY MR. MICHAEL GERTLER:
19 Q. Dr. Spagnolo, wasn't the IAPAG group, the
20 Indoor Air Pollution Advisory Committee, a
21 scientific witness program for The Tobacco
22 Institute?
23 A. I don't know the answer to that.
24 Q. Let's make this easy, Dr. Spagnolo.
25 MR. WITTMANN:
26 We would object, Your Honor, again, to
27 the preambles.
28 MR. MICHAEL GERTLER:
29 This is cross.
30 THE COURT:
31 Sustained.

32 EXAMINATION BY MR. MICHAEL GERTLER:
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18190

1 Q. Dr. Spagnolo, you saw your name under the
2 witness list for IAPAG. Did you or did you not
3 receive payment from IAPAG or The Tobacco Institute
4 for appearing at the meetings that I talked to you
5 about just a minute ago?
6 MR. WITTMANN:
7 Objection. Compound.
8 THE COURT:
9 Overruled. Answer the question if
10 you're able to.
11 THE WITNESS:
12 Could you restate the question?

13 THE COURT:
14 "Dr. Spagnolo, you saw your name under
15 the witness list for IAPAG. Did you or did
16 you not receive payment from IAPAG or The
17 Tobacco Institute for appearing at the
18 meetings that I talked to you about just a
19 minute ago?"
20 THE WITNESS:
21 I have no idea what meetings you're
22 talking about. I have done some work for the
23 Center for Environmental Health and Human
24 Toxicology where I have reviewed some
25 publications. But I have no idea about any
26 of this.
27 EXAMINATION BY MR. MICHAEL GERTLER:
28 Q. Excuse me, Doctor, but are you denying that
29 you received money for your appearances at these
30 meetings that were referred to in Exhibit 0092.04,
31 Spagnolo 3?
32 MR. LONG:
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18191

1 Objection. Argumentative.
2 A. I don't know. I know that I did some things
3 by reviewing documents.
4 MR. LONG:
5 Objection. Argumentative. It assumes
6 facts not in evidence.
7 THE COURT:
8 Overruled. Answer the question, if
9 you're able to.
10 THE WITNESS:
11 I have reviewed some scientific articles
12 for the Center for Environmental Health and
13 Toxicology, so I'm sure that I may have
14 submitted some invoices for my review of
15 those articles. They would have gone to the
16 Center for Environmental Health and Human
17 Toxicology.
18 EXAMINATION BY MR. MICHAEL GERTLER:
19 Q. Who paid you, Doctor?
20 A. I would assume the Center for Environmental
21 Health and Human Toxicology.
22 Q. You don't remember?
23 A. Do I remember that? They must have paid me.
24 Q. So you don't remember specifically who paid
25 you for your testimony?
26 A. To the best of my knowledge, if I had
27 submitted an invoice for reviewing a scientific
28 article, I would have sent it to the Center for
29 Environmental Health and Human Toxicology.
30 Q. And who funded that group, Doctor?
31 A. I have no idea.
32 MR. MICHAEL GERTLER:
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18192

1 Well, Your Honor, I'd like to put on the
2 screen Scott Exhibit 0036.04, please. Put it
3 on the counsels' screen and on Your Honor's
4 screen.
5 EXAMINATION BY MR. MICHAEL GERTLER:

6 Q. Do you recognize that, Doctor?
7 A. (Witness reviews document.) What's on my
8 screen now?
9 Q. Yes.
10 A. No, I don't recognize this.
11 Q. This is a memorandum; correct?
12 A. Yes.
13 Q. It's addressed to William Kloefer of The
14 Tobacco Institute; is that correct?
15 A. That's who it's addressed to.
16 Q. You see the section that's referred to as
17 "Scientific Witnesses"?
18 A. No, I can't read it at the moment.
19 Q. You're having trouble reading it, Doctor?
20 A. I can't. That's correct.
21 MR. MICHAEL GERTLER:
22 Your Honor, I'd ask to publish this
23 document, please.
24 MR. WITTMANN:
25 Objection, Your Honor.
26 MR. LONG:
27 Objection, Your Honor. Foundation.
28 THE COURT:
29 Sustained.
30 MR. MICHAEL GERTLER:
31 Your Honor, may I approach the bench?
32 THE COURT:
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18193

1 Yes.
2 (Whereupon a bench conference is held at
3 this time as follows:)
4 MR. MICHAEL GERTLER:
5 Your Honor, that document came off of
6 The Tobacco Institute website. And we have
7 the document that confirms that. And it is
8 the principals that have already been
9 identified in this case.
10 THE COURT:
11 I understand.
12 But it's not been authenticated before
13 being published. And this doctor -- Is there
14 a dispute about that?
15 MR. LOUIS GERTLER:
16 I don't think there's a dispute.
17 THE COURT:
18 And this witness cannot --
19 MR. LONG:
20 Is this one of the things that was on
21 your exhibit list you filed at 11:00 o'clock
22 this morning?
23 MR. LOUIS GERTLER:
24 We didn't file it at 11:00, no.
25 MR. LONG:
26 This morning?
27 MR. MICHAEL GERTLER:
28 At 9:00 o'clock, just like you do for us
29 every time we had a witness. It's the same
30 thing.
31 MR. LOUIS GERTLER:
32 It's off the TI website.

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1 THE COURT:
2 It's not been authenticated. And if
3 it's objected to, I'm going to keep it out
4 until it's authenticated or unless and until
5 it's authenticated. It hasn't been
6 authenticated and I have an objection.
7 MR. MICHAEL GERTLER:
8 But they used websites --
9 MR. LOUIS GERTLER:
10 Are they objecting because of
11 authenticity? I don't think so. It's off
12 their website.
13 MR. LONG:
14 One of the things I'm objecting to --
15 Well, let's put it this way. I've never seen
16 the document before. The very first time I
17 saw this document was when it was just handed
18 to me. If you put it on the exhibit list
19 this morning, we haven't had a chance to
20 review it for all the objections we normally
21 make.
22 Now, my main objection is he asked the
23 witness: Have you seen this before? No. No
24 personal knowledge. How can he testify about
25 something he has no personal knowledge about?
26 THE COURT:
27 Well, that's the reason I ruled the way
28 I ruled.
29 MR. LONG:
30 Okay.
31 THE COURT:
32 If it can be authenticated or if the
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1 objection is withdrawn, I'll reconsider it.
2 MR. MICHAEL GERTLER:
3 Well, I don't think he's actually made
4 the objection. He said he didn't have time
5 to look at it.
6 MR. LONG:
7 What I'm objecting to is once the
8 document is in front of the witness: Have
9 you seen this before? No.
10 That's 602, he has no personal knowledge
11 about this.
12 MR. LEGER:
13 So its authenticity is not in dispute?
14 It comes off your website. It's a business
15 record.
16 MR. LONG:
17 It doesn't come off my website. It may
18 come off The Tobacco Institute website. I
19 don't know about the authenticity, I haven't
20 had a chance to check it.
21 My objection is foundation as to the
22 witness. 602 says you need personal
23 knowledge. He's just said he's never seen
24 this before.
25 MR. MICHAEL GERTLER:
26 Well, it's because he won't remember.

27 And I'm using it to refresh his memory.
28 MR. LONG:
29 Do you have any evidence to indicate
30 he's ever seen this document before?
31 MR. MICHAEL GERTLER:
32 I don't have to have evidence. He's
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18196
1 denying recollection of everything. He's
2 just saying he doesn't remember.
3 MR. LONG:
4 To the best of his recollection, he's
5 never seen it.
6 THE COURT:
7 Well, I've ruled and I've ruled. Next
8 question.
9 (Whereupon the bench conference is
10 concluded at this time.)
11 THE COURT:
12 Next question, please, Mr. Gertler.
13 MR. MICHAEL GERTLER:
14 Thank you, Your Honor.
15 EXAMINATION BY MR. MICHAEL GERTLER:
16 Q. Dr. Spagnolo, are you denying that the IAPAG
17 group -- Excuse me. Let me rephrase that.
18 Dr. Spagnolo, are you denying to this jury
19 that you're a member of the IAPAG group?
20 A. If I was a member of the IAPAG group, it was
21 not to my knowledge that I was a member of an IAPAG
22 group.
23 Q. Well, then, Doctor, how do you explain for
24 this jury the document that I put up which shows you
25 listed as one of their scientific witnesses? And
26 I'll put it up again for you.
27 Would you please put up again Exhibit Number
28 0092.04 and explain how your name got on that
29 document, sir?
30 MR. MICHAEL GERTLER:
31 May I publish, Your Honor?
32 THE COURT:
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18197
1 You may publish it.
2 A. I don't know how my name got on that
3 document. What I told you a minute ago was that
4 periodically Dr. Witorsch would ask me to -- excuse
5 me -- review scientific articles, of which I would
6 review and send him back the articles. I did not --
7 I was unaware that I was on any committee that he
8 had.
9 MR. MICHAEL GERTLER:
10 So, Carl, would you highlight again the
11 names on that document, please, particularly
12 Dr. -- the name "Spagnola."
13 EXAMINATION BY MR. MICHAEL GERTLER:
14 Q. You don't know how or for what reason that
15 name got on that list?
16 MR. LONG:
17 Objection. Repetitive.
18 THE COURT:
19 Sustained.

20 EXAMINATION BY MR. MICHAEL GERTLER:
21 Q. Dr. Spagnolo, you are alluding now to
22 scientific articles. And I would like to ask you
23 about a couple of scientific articles at this point,
24 okay?
25 A. Okay.
26 Q. When you were asked questions by Mr. Long on
27 COPD and spirometry, did you show the jury any
28 literature supporting your opinion?
29 A. I don't -- You mean yesterday?
30 Q. Well, that's when you primarily testified on
31 COPD; isn't it?
32 A. No, I don't believe we did.
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18198

1 Q. You didn't show the jury any literature?
2 A. I said I don't believe we showed anything
3 yesterday.
4 Q. Well, did you do your research on the
5 literature before you came in here and expressed
6 your opinions to this jury on COPD and spirometry?
7 A. Yes.
8 And I said my opinion was based on my reading
9 of the literature, my experience and my training.
10 MR. MICHAEL GERTLER:
11 Carl, would you put up, please, Exhibit
12 Number 0104.04 on the screen of counsel and
13 The Court?
14 Your Honor, I ask that this be
15 published.
16 THE COURT:
17 Objection?
18 MR. LONG:
19 No objection. No.
20 THE COURT:
21 You may publish.
22 MR. MICHAEL GERTLER:
23 Carl, would you please highlight the top
24 of that particular page and enlarge it,
25 please?

26 EXAMINATION BY MR. MICHAEL GERTLER:
27 Q. That says, "Office Spirometry for Lung Health
28 Assessment in Adults"; is that correct, Doctor?
29 A. Yes, it does.
30 Q. And it is "A Consensus Statement From the
31 National Lung Health Education Program"; correct?
32 A. Correct.
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18199

1 Q. Did you tell this jury there was no consensus
2 statement recommending spirometry for adult smokers?
3 A. I believe I said there were no major
4 organizations that had come to a consensus.
5 Q. That's what you told them?
6 A. I believe so.
7 Q. Do you recognize the members of this
8 organization, the National Lung Health Education
9 Program, Doctor?
10 A. Yes, I've heard of them.
11 Q. You certainly have heard of Dr. Crapo;
12 haven't you?

13 A. I don't see his name there, I'm sorry.
14 MR. MICHAEL GERTLER:
15 Carl, would you go to Page 13, please?
16 And publish, if we may, Your Honor, Page
17 13?
18 THE COURT:
19 You may publish it.
20 MR. MICHAEL GERTLER:
21 And at the right-hand side of Appendix
22 2, Carl, would you highlight and enlarge
23 those names from that point on down?
24 EXAMINATION BY MR. MICHAEL GERTLER:
25 Q. You see some of the names, Doctor, of the
26 consensus conference?
27 A. Yes.
28 Q. You see one of them as being Dr. Crapo,
29 Robert O. C-R-A-P-O?
30 A. Dr. Crapo.
31 Q. Yes.
32 And you have testified that he was a pioneer,
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18200

1 right, in administering pulmonary function tests?
2 A. Yes, he has a good reputation.
3 Q. And all of these people who joined in this
4 consensus statement, Doctor, are well-recognized
5 pulmonologists; aren't they?
6 A. Yes, they are.
7 Q. Yes.
8 Now, let's go back, Carl, if you would,
9 please, to the first page of the document. And
10 highlight for me the first four lines on the
11 abstract. And enlarge it.
12 All right. Doctor, I ask you to read with
13 me. "COPD is easily detected in its preclinical
14 phase...." Stop.
15 "Preclinical phase," that means before
16 symptoms; isn't that correct, Doctor?
17 A. That's what they're saying.
18 Q. Yes.
19 And you told this jury that you can't have
20 COPD without symptoms; didn't you?
21 A. That's correct. That's my opinion.
22 Q. Now, let's go on, Doctor.
23 "...using spirometry, and successful smoking
24 cessation (a cost-effective intervention) prevents
25 further disease progression."
26 Did I read that correctly, Doctor?
27 A. Yes, you did.
28 Q. Now, let's go on, Doctor.
29 "This consensus statement recommends the
30 widespread use of office spirometry by primary-care
31 providers for patients 45 years old and older who
32 smoke cigarettes."
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18201

1 Isn't that this consensus recommendation of
2 this group, Doctor?
3 A. That's from this limited group.
4 Q. Yes, limited group.
5 And this is the -- You testified to this jury

6 that that would not be your recommendation; right?
7 A. That is not my recommendation nor of any
8 major scientific large national organization.
9 Q. Now, Doctor, this statement that I just read
10 with you to this jury was contained in which
11 journal?
12 A. The American College -- It's in the Chest
13 journal.
14 Q. That's the journal that you told the jury you
15 serve on the Editorial Board of; correct?
16 A. That's correct.
17 Q. Did you review this article before it was
18 published, Doctor?
19 A. No, I did not.
20 Q. Did you see this article after it was
21 published, Doctor?
22 A. I've read this article, yes.
23 Q. Now, as a member of the Editorial Board, you
24 had the opportunity to write to the Editorial Board
25 yourself and refute anything that's contained in a
26 published, peer-reviewed journal; isn't that true?
27 A. Do I have the right to do that?
28 Q. Yes, sir.
29 A. Yes.
30 Q. Did you?
31 A. No.

32 MR. MICHAEL GERTLER:
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18202

1 Carl, would you turn to the next page,
2 please? That's Page 1147.
3 And, Your Honor, may we publish that
4 page?
5 THE COURT:
6 You may publish it.
7 MR. MICHAEL GERTLER:
8 And, Carl, would you highlight the
9 "Recommendation," please, and enlarge it for
10 the jury?

11 EXAMINATION BY MR. MICHAEL GERTLER:
12 Q. "Recommendation," Doctor. "Primary-care
13 providers...." Aren't you a primary-care provider?
14 A. I don't know in terms of the technical sense
15 whether I'm considered a primary-care provider or a
16 specialist. I would leave that up to you.
17 Q. Well, don't leave it up to me then, Doctor.
18 Let's go with the "Recommendation."
19 "Primary-care providers (PCPs) should perform
20 an office spirometry test for patients 45 years old
21 and greater who report smoking cigarettes (current
22 smokers and those who quit during the previous year)
23 in order to detect COPD."
24 Did I read that correctly?
25 A. You did.
26 Q. And isn't that exactly what we're proposing
27 to this jury as a remedy for these victims of the
28 fault of these tobacco companies?

29 MR. LONG:
30 Object to the form, Your Honor.
31 THE COURT:
32 Sustained. Don't answer that question.
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1 The objection to the form of the question is
2 sustained.

3 Next question, please.

4 MR. MICHAEL GERTLER:

5 All right.

6 EXAMINATION BY MR. MICHAEL GERTLER:

7 Q. Doctor, don't you understand when you came to
8 testify today that part of the proposal that we are
9 making is that smokers who are greater than 45 years
10 old, with a certain amount of pack history, should
11 have spirometry to detect COPD?

12 A. My understanding of this is that you're
13 proposing that they have things that may aid them in
14 help of smoking cessation to detect latent disease.

15 Q. And you agree with that; don't you? That a
16 cessation program is the right way to go?

17 A. I agree with what you just said, that it's to
18 detect latent disease.

19 Q. And by "latent," you mean undiagnosed?

20 A. No, I think I defined "latent" this morning
21 as not demonstrable or hidden.

22 Q. Hidden and not yet detected by a physician;
23 isn't that what you mean, Doctor?

24 A. Well, this was in the setting this morning
25 that we talked about this, these would be
26 asymptomatic people.

27 Q. Well, these people's recommendation was that
28 all smokers greater than 45 years old or those who
29 have quit within one year should receive spirometry
30 to detect COPD; is that true?

31 A. That's the recommendation of this group.

32 Q. Now, by the way, Doctor, have you ever
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1 written an article or even suggested in an article
2 that could be peer-reviewed your opinion about COPD
3 and spirometry?

4 A. I don't believe so.

5 Q. Doctor, look --

6 Carl, would you highlight under Number 1,
7 please, on that same page, the two sentences there?

8 Read with me, would you, please, Doctor.

9 "The disease, if not detected early, would go
10 on to cause substantial morbidity or mortality."

11 And that's why they're recommending the COPD
12 test with spirometry; isn't that correct?

13 A. That's what they're saying in this article.
14 I don't agree with them, but that's what they're
15 saying in this article.

16 Q. Now, Doctor, you know something about
17 morbidity and mortality from COPD; don't you?

18 A. I do.

19 Q. Okay. In fact, you've testified in cases
20 before before the Department of Labor, Occupational
21 Disease Department, on people who have COPD; didn't
22 you?

23 A. Yes.

24 Q. You testified against those people?

25 A. I'm not sure I understand your question --

26 Q. Well, in those --

27 A. -- where I testified.
28 Q. Well, in those cases, there were people who
29 were claiming that their disease was caused by their
30 exposure to dust in the workplace and they were
31 asking for lung transplant and/or medical bills;
32 isn't that correct?
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18205

1 A. I don't know if I've testified. I've
2 certainly written reports.
3 Q. You've expressed your expert opinion?
4 A. That's correct.
5 Q. And in those cases, you expressed your expert
6 opinion that all of their problems, their lung
7 transplant and their medical bills, was all due to
8 COPD caused by smoking? Is that what you did?
9 A. Well, you would have to give me which opinion
10 and which case that I might have expressed an
11 opinion in in terms of a medical opinion. I
12 couldn't answer that question.
13 Q. You don't remember doing that, Doctor?
14 A. No, I said I couldn't remember which case you
15 might be talking about.
16 Q. Doctor, let me just ask you: Do you remember
17 the lung transplant case that you offered your
18 opinion in?
19 A. No, I don't.
20 Q. Do you recall a case by the name of Anna Ruth
21 Powers versus Mining Energy, Inc.?
22 A. No.

23 MR. MICHAEL GERTLER:
24 Your Honor, may I approach the witness?
25 THE COURT:
26 Yes.
27 Does opposing counsel have a copy of
28 what you're about to show the witness?
29 MR. MICHAEL GERTLER:
30 Should.
31 MR. LONG:
32 I don't know. I haven't seen it. I
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18206

1 don't have a number or anything else.
2 MR. MICHAEL GERTLER:
3 Can we take one moment, please, Judge?
4 (Whereupon a discussion was held off the
5 record.)
6 MR. MICHAEL GERTLER:
7 Sorry, Doctor. I didn't know I'd have
8 to go back to this volume.
9 EXAMINATION BY MR. MICHAEL GERTLER:
10 Q. While we're at it, Doctor, Your Honor, if I
11 might ask one question so that both documents can be
12 checked?
13 Doctor, do you recall a case by the name of
14 Clarence Davis versus Tennessee Consolidated Coal
15 Company?
16 A. No, I don't.
17 MR. MICHAEL GERTLER:
18 Excuse me, Your Honor.
19 May I proceed with a few questions, Your

20 Honor, while we're checking the numbers on
21 those cases?
22 THE COURT:
23 Sure.
24 EXAMINATION BY MR. MICHAEL GERTLER:
25 Q. Dr. Spagnolo, do you remember going before
26 the Department of Labor and submitting your expert
27 opinions in writing in 1995?
28 A. I'm sorry. Before who?
29 Q. Well, before the Department of Labor in 1995
30 with regard to hearings on occupational disease?
31 A. No, I don't remember.
32 Q. I think it's actually called, sir -- I don't
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18207

1 want you to misconstrue -- it's the Office of
2 Workers' Compensation for the Department of Labor.
3 And I thought I needed to get that direct question
4 to you.
5 Do you remember submitting your expert
6 opinions in at least three cases in 1995?
7 A. The Labor Department has -- I've been a
8 consultant to the Labor Department for a period of
9 time. And, occasionally, they do send me a case to
10 review. I will review the case and I will send them
11 back a written opinion of whatever material they may
12 have sent me to review.
13 So I have done it, but I don't remember the
14 name of the -- I don't keep a list of those cases,
15 so I don't remember them.
16 Q. So even if I told you, Doctor, you did that
17 in relation to a lung transplant where the victim
18 was trying to get payment for the medical cost of a
19 lung transplant, that doesn't help you refresh your
20 memory at all?
21 A. No, it doesn't because they've sent me --
22 I've been doing this for twenty-five years, so I
23 couldn't remember -- I can't remember all those
24 cases. I'd be happy to look at it.
25 Q. Well, how many of those cases did you tell
26 the Office of Workmen's Comp that the people's
27 problems were all due to smoking and not at all due
28 to their workplace?
29 A. I have no --

30 MR. LONG:
31 Objection, Your Honor. Could I
32 approach?
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18208

1 THE COURT:
2 You may approach.
3 (Whereupon a bench conference is held at
4 this time as follows:)
5 THE COURT:
6 Mr. Long?
7 MR. LONG:
8 I object to the relevance of this line
9 of questioning. Number one, the witness has
10 already said, I mean, if they're trying to
11 say that smoking causes COPD, he's already
12 said that. If they're trying to make some

13 attack on credibility because he links
14 smoking as opposed to this occupational
15 environment, that in itself is not an attack
16 on credibility.

17 What are we going to do? Put on
18 evidence of each of these cases to see
19 whether it was really caused by an
20 occupational exposure or by tobacco? I mean,
21 again, they're trying to have a bunch of mini
22 trials to prove credibility here.

23 What he testified to in the individual
24 case without knowing the facts of the case,
25 impeachment is not credible, it's not
26 relevant. So he said it's smoking and not
27 that. How is it relevant to this case?

28 THE COURT:

29 It may be relevant to his credibility.
30 I'm going to allow him to answer the
31 question, if he's able to.

32 MR. LONG:

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18209

1 Well, let me put on the record that this
2 is going to open the door then for us to put
3 in evidence about each of these cases on what
4 the other exposures were, how significant.
5 That's my point. Without the jury knowing
6 the underlying evidence, how can they assess
7 credibility? Unless they know what the
8 exposure was, how much it was. I mean,
9 it's --

10 THE COURT:

11 He's an expert and entitled to attack
12 credibility, and you'll have an opportunity
13 for redirect. And I'll rule on the
14 objections as and when they come.

15 (Whereupon the bench conference is
16 concluded at this time.)

17 THE COURT:

18 The objection is overruled.

19 Answer the question, if you're able to.

20 And I'll read it back to you:

21 "Well, how many of those cases did you
22 tell the Office of Workmen's Comp that the
23 people's problems were all due to smoking and
24 not at all due to their workplace?"

25 THE WITNESS:

26 I can't answer that question.

27 EXAMINATION BY MR. MICHAEL GERTLER:

28 Q. Well, let's see, Doctor.

29 I have now, Your Honor, Exhibit Number
30 0204.04, which is the matter entitled Clarence Davis
31 versus Tennessee Consolidated Coal Company, and ask
32 if I may approach, Your Honor?

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18210

1 THE COURT:

2 The witness?

3 MR. MICHAEL GERTLER:

4 Yes.

5 THE COURT:

6 You may approach the witness.
7 MR. MICHAEL GERTLER:
8 Thank you, Your Honor.
9 EXAMINATION BY MR. MICHAEL GERTLER:
10 Q. Dr. Spagnolo, would you please review that
11 case and tell me whether that is the lung transplant
12 case where you expressed your opinion before the
13 Office of Workers' Comp?
14 A. (Witness reviews document.)
15 Q. Have you found your name yet, Doctor?
16 A. I thought you asked me to read the document.
17 I'm sorry.
18 Q. Okay. Review it. Do whatever you have to
19 do, Doctor.
20 Would you like to take the break now, Your
21 Honor, or wait so he can review these two cases?
22 Whatever you say, Your Honor.
23 THE COURT:
24 It's a little early, but we'll take our
25 mid-morning -- mid-afternoon recess at this
26 point for fifteen minutes, until twenty-five
27 minutes before the hour by the wall clock.
28 MR. MICHAEL GERTLER:
29 Thank you, Your Honor.
30 Your Honor, may I approach the witness
31 with the other case at this point and let him
32 review both of them at the same time?
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18211

1 THE COURT:
2 Yes, you may do that.
3 (Whereupon the jury is excused at this
4 time.)
5 THE COURT:
6 Let the record reflect the jury has left
7 the courtroom.
8 Anything for the record by plaintiffs'
9 counsel?
10 MR. MICHAEL GERTLER:
11 Your Honor, we'd just like to put on the
12 record that I have provided the witness with
13 the two cases. And I'd like to put the
14 exhibit numbers on the record right now, if I
15 could, Your Honor.
16 MR. LONG:
17 What's the other number?
18 MR. BENCOMO:
19 He's going to give it to you right now.
20 MR. MICHAEL GERTLER:
21 It's 0127.04.
22 MR. LONG:
23 For the record, Your Honor, we're going
24 to object to questioning the witness about
25 the documents. I haven't seen the other one.
26 This appears to be something off a website of
27 some office of Administrative Law Judge, it
28 appears to be some decision and order of an
29 Administrative Law Judge.
30 THE COURT:
31 So that the record is clear, Mr.
32 Gertler, you've given the witness a copy of
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1 Exhibit 0204.04 and 0127.04; is that correct?
2 MR. MICHAEL GERTLER:
3 Yes, Your Honor.
4 THE COURT:
5 Anything else for the record by
6 plaintiffs' counsel?
7 MR. BENCOMO:
8 Yes, Your Honor.
9 Just if I may, in Dr. Spagnolo's report
10 of July 5th, 2000, in the attachment, Roman
11 numeral I, the doctor talks, and I quote, in
12 part, "With the exception of a recent
13 deposition and testimony, it is impossible
14 for me to recall case captions, names and/or
15 number" as he was instructed to do by your
16 Case Management Order.
17 "Therefore, I cannot provide a formal
18 list of such cases with the exception of a
19 recent deposition which was in Blankenship
20 and then testimony in another case,
21 Halterman."
22 One of the cases that we have fits
23 within Your Honor's order. And we certainly
24 went out and determined which cases he had
25 previously given testimony in.
26 THE COURT:
27 And is that one of the two case records
28 that you've given -- Is that one of the two
29 exhibits you've given to the witness?
30 MR. BENCOMO:
31 Yes, Your Honor.
32 THE COURT:

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1 All right.
2 Anything else for the record by
3 plaintiffs' counsel?
4 MR. RUSS HERMAN:
5 Yes, there is.
6 MR. MICHAEL GERTLER:
7 Yes, Your Honor, there is one other
8 thing. I'm sure you're still considering it.
9 But that document that's the transcript of
10 his testimony that you took under advisement
11 in terms of whether I could introduce it into
12 evidence based on past recollections
13 recorded, and you were going to check that
14 out.
15 And Russ is just bringing to my
16 attention, Your Honor, that it was before an
17 official government body, so --
18 THE COURT:
19 What's the exhibit number?
20 MR. MICHAEL GERTLER:
21 -- it's an official government document.
22 THE COURT:
23 I think that's 0047.04?
24 MR. BENCOMO:
25 That's correct.
26 THE COURT:

27 Anything for the record by defense
28 counsel?
29 MR. WITTMANN:
30 Yes, Your Honor.
31 MR. LONG:
32 Number one, if you look at that
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18214

1 exhibit --
2 THE COURT:
3 I'm sorry?
4 MR. LONG:
5 -- they're talking about now, it looks
6 to be a written letter or something to the
7 D.C. City Council, the document that they're
8 referring to, they're trying to get in. I've
9 got several other things.
10 THE COURT:
11 0047.04?
12 MR. LONG:
13 Is that the thing that --
14 MR. MICHAEL GERTLER:
15 Yes.
16 MR. LONG:
17 Yes, that's right.
18 If you look at it itself, I mean, it's
19 not a transcript of anything. If you look at
20 the second page, it talks about submission or
21 other materials that you want to --
22 THE COURT:
23 My hard copy has disappeared.
24 I remember the document. I just don't
25 have a hard copy of it. That's the document
26 in which, Mr. Long, you have highlighted in
27 yellow a dollar figure?
28 MR. MICHAEL GERTLER:
29 Yes, that's it, Your Honor.
30 MR. LONG:
31 Yes. Yes.
32 MR. LOUIS GERTLER:

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18215

1 That's been redacted.
2 MR. LONG:
3 That's the document.
4 But if you look at the document, number
5 one, it's not a sworn transcript. It's a
6 submission of --
7 THE COURT:
8 I'm trying to look at the document now.
9 MR. LONG:
10 Okay. I thought you had it.
11 MR. MICHAEL GERTLER:
12 It refers to testimony. I just want to
13 make reference to that.
14 MR. LONG:
15 It says testimony.
16 THE WITNESS:
17 Your Honor, may I be excused?
18 THE COURT:
19 Yes.

20 We'll recess until --
21 MR. LONG:
22 Your Honor, I've got --
23 MR. WITTMANN:
24 I've got one other thing, Your Honor,
25 for the record.
26 THE COURT:
27 Mr. Long?
28 MR. LONG:
29 Yes.
30 Both of these exhibits that we're going
31 to have Dr. Spagnolo read appear to be
32 opinions of --
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18216

1 MR. BENCOMO:
2 Excuse me, Your Honor.
3 Let me interrupt for one second. If Dr.
4 Spagnolo could leave the room while you're
5 making the argument, I'd appreciate it. As
6 he was getting ready to do.
7 THE WITNESS:
8 Do you want me to stay?
9 MR. BENCOMO:
10 Please.
11 THE WITNESS:
12 Do you want me to stay?
13 MR. BENCOMO:
14 We do not. We do not.
15 THE WITNESS:
16 You want me to leave?
17 MR. BENCOMO:
18 Please.
19 MR. LONG:
20 Thank you, Doctor.
21 THE COURT:
22 Mr. Long.
23 MR. LONG:
24 I've not had a chance to review the
25 other one. But Exhibit 0204.04, it's another
26 one of these documents that we got this
27 morning, we haven't even had a chance to look
28 at. What I can see is that it's a decision
29 and order of an Administrative Law Judge.
30 It's not a report by Dr. Spagnolo, it's not
31 testimony by Dr. Spagnolo. It's somebody
32 expressing his position.

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18217

1 I think this thing is inadmissible.
2 It's nothing that he said. It's not his own
3 statement. And for the further reasons that
4 I think we're getting into an area of whether
5 we're debating which is the right position to
6 take before an Administrative Law Judge in
7 another case and somehow that's relevant
8 here. But that's the objection I have as to
9 using this as hearsay. It's not written by
10 him, it may or may not accurately summarize
11 what he says.
12 Also, some time ago when we -- before we

13 started cross-examination, The Special Master
14 sent a letter dated January 17th, 2003, which
15 directed that "The cross-examining party
16 shall deliver to The Court and the opposing
17 party a list of documents, exhibits,
18 depositions and demonstrative aids that will
19 be used during the cross of the expert," it
20 says, "in the order of their use." I think
21 the "in the order of their use" has fallen by
22 the wayside. "The list shall be delivered to
23 The Court and the opposing party at 9:00 a.m.
24 the morning of the day the cross is expected
25 to commence."

26 Which is what we did throughout our
27 case. We collected the materials that we
28 might reasonably use with each expert and
29 then delivered it at 9:00 a.m. that morning,
30 along with an index.

31 This morning we got four boxes of cross-
32 examination documents that the plaintiffs say
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18218

1 will be used with all of our will-call or
2 may-call witnesses. And that's not what The
3 Special Master's letter called for.

4 Now, whether The Special Master's letter
5 was intended just for the convenience of the
6 parties or to give the parties an opportunity
7 to go through the cross-examination documents
8 which, obviously, the plaintiffs availed
9 themselves each and every time we produced a
10 limited set we would use, may be open to
11 question.

12 One thing is clear. And whether they
13 should be criticized or congratulated, we've
14 been sandbagged big time by this procedure of
15 dumping all of these documents they may use
16 and then they say they may supplement.
17 That's not the procedure set forth in The
18 Special Master's correspondence.

19 MR. BENCOMO:
20 Judge, if I may just reply very briefly.

21 MR. WITTMANN:
22 If I could --

23 MR. BENCOMO:
24 Yes, please.

25 MR. WITTMANN:
26 We've got a 50-page index of these
27 documents that's supposed to apply to all of
28 cross-examination.

29 THE COURT:
30 I think I have it.

31 MR. WITTMANN:
32 You've got it.

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18219

1 And, you know, it's just unfair, Judge.
2 We submitted the exact copies we were going
3 to use on cross. They should be required to
4 do the same thing.

5 THE COURT:

6 Mr. Bencomo, you wish to be heard?
7 MR. BENCOMO:
8 Yes, Your Honor.
9 Just some quick points on the issue
10 of --
11 THE COURT:
12 I want you to reply to Mr. Long's
13 statement and Mr. Wittmann's, if you're able
14 to, because I'm going to address that. If
15 it's on a different subject, I'm going to
16 address that before you speak. So if it's on
17 that subject, you may speak.
18 MR. BENCOMO:
19 On the documents produced? I am not the
20 one that's going to address that issue.
21 MR. MICHAEL GERTLER:
22 Well, I'd like to address it. But I'm
23 told Russ --
24 MR. BENCOMO:
25 I believe Mr. Herman is the one that's
26 going to address that issue, Your Honor, if I
27 may.
28 MR. MICHAEL GERTLER:
29 I would love to just preliminarily
30 address it.
31 MR. BENCOMO:
32 I can, in the meantime, address the
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18220

1 issue of Dr. Spagnolo and these cases, if
2 Your Honor wishes me to be heard.
3 MR. RUSS HERMAN:
4 Yes, Judge.
5 THE COURT:
6 Confer with your co-counsel for a moment
7 and then I'm going to ask you to reply.
8 MR. RUSS HERMAN:
9 Sure.
10 (Whereupon a discussion was held off the
11 record.)
12 MR. RUSS HERMAN:
13 Yeah, I'll reply, Your Honor.
14 Throughout the trial, these folks have
15 served us with hundreds of documents that
16 were never offered and never used. And I
17 understood that because you can't predict
18 what a witness is going to say.
19 I have -- We have, in order so that
20 there would be no problems, I've had four
21 different signals, and so have you, as to
22 when witnesses on their side will take the
23 stand.
24 For example, I was told that the doctor
25 from New Orleans would be on tomorrow. I've
26 been told twice that Dr. Viscusi would be on
27 Thursday. We have endeavored to provide them
28 in advance every document that's going to be
29 used this week. We were never -- And that we
30 would supplement it.
31 Dr. Viscusi, as I announced on last
32 week, was going to be the subject of a
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1 Daubert challenge. He's got hundreds and
2 hundreds of documents listed that we haven't
3 seen, okay? I've asked that they be
4 identified by number. I can't predict and
5 I'm not sandbagging anybody. I brought this
6 issue up before. We have given them fair
7 notice.

8 We went through ten weeks or nine weeks
9 of trial with them showing up on the morning
10 of cross-examination with their documents,
11 and we had to sit patiently at these two
12 tables, having four lawyers read every
13 document, and most of them were never used.
14 And I don't understand what this finger
15 pointing is now.

16 Secondly, we were told to have those
17 documents served this morning. They were.

18 Lastly, Your Honor, I'm very concerned
19 because now I'm still getting Viscusi
20 documents. I got demonstratives today. I've
21 got a ton of documents, a number of them on
22 his reliance list. I'm told that he may
23 testify tomorrow, but I'm supposed to get 48
24 hours. They were supposed to have
25 demonstratives in on Sunday and on Saturday
26 that we didn't get.

27 THE COURT:

28 The rules that have been laid down in my
29 trial orders and the instructions that you've
30 received from The Special Master are going to
31 be enforced. I thought you folks were trying
32 to cooperate.

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1 I get an objection today to the letter
2 over Mr. Herman's signature dated April 8th
3 which says, "Please enclose our cross-
4 examination documents as per the attached
5 list. We shall utilize these documents in
6 connection with the testimony of the
7 witnesses you have named this week for all
8 your will-call and many of your may-call
9 witnesses. We shall supplement these
10 exhibits on the morning of the cross of
11 certain witnesses. Please maintain this set
12 of documents."

13 The complaint I have is that there's no
14 specificity in this list as to which
15 witnesses these documents will be used when
16 cross occurs. And that's the complaint: The
17 non or the failure to specify the witnesses
18 as to which these documents will be used on
19 cross.

20 He cites a letter from Mr. Gianna dated
21 January 27, 2003.

22 MR. LONG:

23 17th.

24 THE COURT:

25 It looks like 27 to me.

26 MR. LONG:

27 Yep, you're right. They do.
28 THE COURT:
29 "Judge Ganucheau has asked me to advise
30 you the following procedures will be followed
31 during the cross of expert witness. The
32 cross-examining party shall deliver to The
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18223

1 Court and the opposing party a list of
2 documents, exhibits, depositions and
3 demonstrative aids that will be used during
4 the cross of the expert in the order of their
5 use. The list shall be delivered to the
6 opposing party at 9:00 a.m. on the morning of
7 the day the cross is expected to commence. A
8 copy shall be provided to The Court and the
9 opposing party by 9:00 a.m."

10 That's the complaint.

11 MR. RUSS HERMAN:

12 Your Honor, --

13 THE COURT:

14 You don't specify which documents will
15 be used to cross which witnesses.

16 MR. RUSS HERMAN:

17 I understand that.

18 If I knew when these witnesses were
19 being called, I could get them here by 9:00
20 a.m. What I was attempting to do was notify
21 them in advance of the --

22 THE COURT:

23 I understood that you had a list of
24 witnesses in the order in which they were
25 going to be called.

26 MR. RUSS HERMAN:

27 I was told, Your Honor, that -- I was
28 not told and I still don't know when Dr.
29 Viscusi is going to be called and when the
30 doctor who is the heart doctor from New
31 Orleans who's in the courtroom is going to be
32 called, which is why the exhibits for those

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18224

1 witnesses were brought to court today.

2 Now, I can assure Your Honor, if I have
3 to, and I'm in error, I will go back and for
4 each day that they served us with documents
5 during the cross-examination of our witnesses
6 this order was violated.

7 MR. WITTMANN:

8 Your Honor, --

9 MR. RUSS HERMAN:

10 I had no idea -- I had no idea that I
11 was going to be in violation by providing all
12 of the documents that I thought would be used
13 this week.

14 MR. WITTMANN:

15 Your Honor, we told Mr. Herman last
16 Friday who the witnesses would be this week.
17 And the witnesses were going to be Spagnolo,
18 Eiswirth and Viscusi. They've known that.

19 MR. RUSS HERMAN:

20 I was told that Dr. Spagnolo would be --
21 had to leave here today, okay? And that the
22 heart doctor would be tomorrow but he's in
23 court today. And I was told he'd probably
24 get on this afternoon. And that Viscusi,
25 instead of being called Thursday, would
26 probably go on Wednesday. So --

27 THE COURT:

28 Listen to what the instructions are, Mr.
29 Herman.

30 MR. RUSS HERMAN:

31 I understand.

32 THE COURT:

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18225

1 Listen.

2 "The cross-examining party shall deliver
3 to The Court and opposing party a list of
4 documents, et cetera, that will be used
5 during the cross of the expert in the order
6 they are used. The list shall be delivered
7 to The Court and opposing counsel at 9:00
8 a.m. the morning of the day the cross is
9 expected to commence."

10 If the heart doctor gets on today and
11 cross commences tomorrow, the list is due
12 tomorrow at 9:00 a.m. That's the way I read
13 it, 9:00 a.m. on the day cross is expected to
14 commence.

15 If the direct is unpredictably much
16 shorter than it was thought to be and the
17 cross begins a lot earlier than you could
18 have reasonably expected, I will take that
19 into consideration.

20 But this is an attempt for an orderly
21 exchange of information. And I'm going to
22 enforce it.

23 MR. RUSS HERMAN:

24 We will -- We will provide a list in the
25 order, based on that, of which documents will
26 be used to the best we can with the next
27 witnesses.

28 THE COURT:

29 Do you have this letter? I'll get a
30 copy to you. Because I don't have it. But
31 Mr. Long has produced it. And I have no
32 doubt that it is what it purports to be.

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18226

1 MR. RUSS HERMAN:

2 Judge, I have no doubt -- I have no
3 doubt that I received it. I have no doubt
4 that that's what The Court's rule is.

5 THE COURT:

6 We're going to give you another one
7 today.

8 MR. RUSS HERMAN:

9 I'd appreciate it.

10 THE COURT:

11 Okay.

12 MR. BENCOMO:

13 Judge, may I address this Dr. Spagnolo
14 issue just to complete the record?
15 THE COURT:
16 Yes.
17 MR. BENCOMO:
18 Thank you.
19 MR. RUSS HERMAN:
20 Your Honor, if I could be excused, I'm
21 going to go back and deal with this.
22 MR. BENCOMO:
23 Judge, just three quick points.
24 The first is that the documents were
25 delivered to the defendants with reference to
26 Dr. Spagnolo as per Your Honor's court order
27 by 9:00 o'clock this morning.
28 THE COURT:
29 Wait. Let me stop you.
30 Were they listed in this tone or were
31 they delivered and said, "This is the list
32 of Spagnolo cross documents and here are
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18227

1 copies"?
2 MR. RUSS HERMAN:
3 I'm sorry.
4 THE COURT:
5 I was speaking to Mr. Bencomo because he
6 made the statement.
7 MR. RUSS HERMAN:
8 Oh.
9 MR. BENCOMO:
10 As to how the Spagnolo documents were
11 listed. And I don't know the answer to that,
12 Your Honor.
13 THE COURT:
14 Okay.
15 MR. RUSS HERMAN:
16 They're listed -- They're listed
17 specifically in there.
18 THE COURT:
19 Okay.
20 MR. BENCOMO:
21 Two more points, if I may, Judge.
22 The other -- The second point is that
23 Dr. Spagnolo invited Mr. Gertler to let him
24 look at the documents --
25 THE COURT:
26 Mr. Bruno and Mr. Gay, if you want to
27 have a conversation, please step outside of
28 the courtroom.
29 MR. GAY:
30 Sorry, Judge.
31 THE COURT:
32 Mr. Bencomo.

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18228

1 MR. BENCOMO:
2 Yes, Your Honor.
3 -- so that he could refresh his
4 recollection on those cases which he, for
5 whatever reason, neglected to list in his

6 report of July 5th of 2000.
7 The third point, Judge, is that we have
8 him under cross. We certainly are entitled
9 to show this jury his credibility vis-a-vis
10 what his testimony is.
11 Here is an individual who, while he is
12 the Chairman of the Thoracic Association in
13 D.C., as we've already established, lambastes
14 the cigarette industry; while he is
15 testifying on behalf of different
16 manufacturers, puts the onus on a new -- on a
17 number of COPD-related conditions on the
18 cigarette industry and not on those
19 manufacturers; and lo and behold, when he
20 finally is retained by the cigarette
21 industry, by these defendants, he changes his
22 tack completely. And the jury is entitled to
23 hear the difference in those opinions.

24 MR. WITTMANN:

25 Mr. Long has his hand up, Your Honor.

26 MR. LONG:

27 Your Honor, the witness testified that
28 he was employed by the Department of Labor.
29 If the whole basis of this is that he's
30 testifying for some manufacturers, the
31 witness has already said he was a consultant
32 to the Department of Labor. And he hasn't

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New Orleans, Louisiana (504) 525-1753

18229

1 changed his tune. He's told this jury
2 cigarette smoking causes COPD.

3 THE COURT:

4 That's what cross and redirect are for.

5 We'll recess for another five minutes.

6 And then we'll bring the jury back in.

7 (Whereupon a brief recess was taken at
8 this time from 2:42 o'clock p.m. to 2:48

9 o'clock p.m.)

10 THE BAILIFF:

11 All rise for the jury, please.

12 (Whereupon the jury joins the
13 proceedings at this time.)

14 THE LAW CLERK:

15 All rise. Recess is over. Court will
16 come to order.

17 THE COURT:

18 Please be seated.

19 Mr. Gertler, are you ready to continue?

20 MR. MICHAEL GERTLER:

21 Yes, Your Honor.

22 THE COURT:

23 Please do so.

24 EXAMINATION BY MR. MICHAEL GERTLER:

25 Q. Dr. Spagnolo, have you had a chance to look
26 at those two cases I gave you?

27 A. I've never seen these documents before. This
28 is the very first time. And one is 16 pages long,
29 14 pages long. And the other one is 26 pages long.
30 So I've never seen these documents before.

31 Yes, I had a chance to quickly review them.

32 Q. Were those documents, Dr. Spagnolo, the
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1 written opinions of The Court that heard the cases
2 that you presented your expert opinion in; aren't
3 they?

4 A. No, not quite.
5 If I could just --

6 Q. Sure.

7 A. -- add something here.

8 Q. Sure.

9 A. Because I was -- I was working for the United
10 States Government, the United States Department of
11 Labor, as the United States Department of Labor
12 consultant to them.

13 Periodically, fairly frequently, because I
14 was one of the government experts, they would send
15 me medical records on an individual. I would review
16 those medical records. I would then send my review,
17 which could be two pages long or six pages long, and
18 I would send that review back to the Department of
19 Labor.

20 After I sent that to the Department of Labor,
21 I did not appear before this judge and give any
22 testimony. My assumption is he read my report. So
23 this is not -- What's in here is not that I got in
24 front of a court or a judge and provided testimony.

25 I just wanted to let you know because I've
26 never seen these documents, sir. And I don't even
27 actually have my report here to review from which I
28 made my opinions. This is the judge's opinion after
29 the judge read my report. So I just wanted that to
30 be clear.

31 Q. And --

32 A. I have no knowledge -- Excuse me. I have no
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1 knowledge of what happens after I submit my report.

2 Q. All I wanted to know, Dr. Spagnolo, is did
3 that refresh your memory as to the case you
4 submitted your report in saying that the man's lung
5 transplant was due to COPD from smoking as opposed
6 to his exposure in the workplace? Do you remember
7 that now?

8 A. Well, I read what I said here, yes, and --
9 but I don't have my original report to review is all
10 I'm telling you. And I don't know which case you're
11 talking about.

12 Which case are you talking about, by the way?

13 Q. Do you want me to come point it out to you?

14 A. Is it the first one? I'm not trying to be --
15 I just want to know. Is it the first case?

16 Q. You know, I'm trying to proceed
17 expeditiously. You want me to point it out to you?
18 See here where it says, "Lung transplant"?

19 A. It does say, "Receiving a lung transplant."

20 Q. Right.

21 And the other, the man died from lack of
22 oxygen. And you said that was due to COPD from
23 smoking; did you not?

24 A. No.

25 In the first case, if I could just say what I
26 said --

27 Q. Anything you want.
28 A. -- because I don't have the document. I said
29 he was diagnosed -- I said that he had bullous
30 emphysema due to probably -- I don't know if I said
31 -- I thought -- The judge is quoting me somewhere
32 that I thought the patient -- the miner had bullous
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18232

1 emphysema related to cigarettes.
2 MR. MICHAEL GERTLER:
3 Your Honor, may I offer, introduce and
4 file into evidence these two exhibits at this
5 time?
6 MR. WITTMANN:
7 Objection, Your Honor.
8 MR. SHOLES:
9 Objection.
10 MR. LONG:
11 Me, too.
12 THE COURT:
13 Do you wish to approach the bench on the
14 objections?
15 MR. WITTMANN:
16 Yes, Your Honor.
17 THE COURT:
18 You may approach.
19 (Whereupon a bench conference is held at
20 this time as follows:)
21 THE COURT:
22 Objection?
23 MR. WITTMANN:
24 Your Honor, it's clearly hearsay. And
25 it's not the witness' testimony or prior
26 testimony of any sort what some judge
27 somewhere, some Administrative Law Judge
28 apparently came up with as a result of these
29 cases. It's just totally irrelevant to
30 anything that's involved here.
31 MR. LONG:
32 Further, Your Honor, it's to bias or
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18233

1 credibility perhaps if he had been employed
2 by the defendants in one of these cases and
3 it absolved their product. That's one issue.
4 He's testified he was a consultant, he
5 was the United States Department of Labor's
6 consultant. Without analyzing the propriety
7 of whether he was right or wrong, there's no
8 way to raise a credibility issue. He wasn't
9 employed by a party to the case.
10 MR. SHOLES:
11 Further, Judge, it is extremely
12 prejudicial because there's virtually no way
13 the defendants can defend against this.
14 Because we have no way of giving the doctor
15 his original report so that he can at least
16 refute any misstatements or allegations that
17 are made by Mr. Gertler or the judge who
18 wrote that report.
19 THE COURT:

20 Well, I will make an observation. He
21 equivocated when asked for a list of cases on
22 his medical report, he didn't give any, they
23 found them. Now, I make no comment about why
24 or what motivation or the effect of it. But
25 I make the comment that it would have been
26 simpler if the disclosure had been made.
27 Let me hear the opposition to the
28 objection, please.
29 MR. MICHAEL GERTLER:
30 Yes, Your Honor.
31 That's exactly the point. I could spend
32 the next --

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18234

1 THE COURT:
2 Well, the point in my -- the thing I
3 have to decide is under what authority do
4 they go into evidence. There's been no
5 authentication, they don't appear to be
6 official publications, they're printouts from
7 a website, they've not been authenticated and
8 they contain hearsay, they contain what the
9 judge is saying about what Spagnolo said.
10 And that's hearsay.

11 Now, how do they get in?
12 MR. MICHAEL GERTLER:
13 It's an exception to the hearsay rule,
14 which is that I'm not offering them for the
15 truthfulness but the fact that that's what
16 the case was about. I can't get him to admit
17 that he expressed an opinion with regard to
18 the lung transplant that was due to COPD, and
19 that's what's stated in that case. And I
20 can't get him to admit that the case was
21 about the death from loss of oxygen due to
22 COPD, and that was his opinion, and that's
23 stated in the case. And I'm not trying to
24 say it's true or not true. But he won't
25 admit anything, Judge.

26 THE COURT:
27 I think it is being offered for the
28 truth of the matter stated, Mr. Gertler. I
29 disagree with you.

30 The objection is sustained. You may
31 proffer them.

32 (Whereupon the bench conference is
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18235

1 concluded at this time.)
2 THE COURT:
3 The objection to 0204.04 and 0127.04 are
4 sustained.

5 Next question, please.

6 EXAMINATION BY MR. MICHAEL GERTLER:

7 Q. Dr. Spagnolo, do you agree that if COPD is
8 left unattended, that it can lead to a lung
9 transplant and/or death from lack of oxygen?

10 A. I'm not sure what you mean by the word
11 "unattended." But COPD, if a person continues to
12 smoke, could end up leading to requiring a lung

13 transplant.
14 Q. And is that why you expressed the opinion,
15 Doctor, in this case that a cessation program would
16 be important to help smokers, who want to quit, quit
17 smoking?

18 MR. WITTMANN:

19 Objection, Your Honor. You just
20 excluded -- May I approach?

21 THE COURT:

22 Mr. Wittmann, you're supposed to say
23 that at the bench.

24 MR. WITTMANN:

25 May I approach.

26 THE COURT:

27 And you know that. You may approach.
28 (Whereupon a bench conference is held at
29 this time as follows:)

30 THE COURT:

31 Mr. Gertler, come over here and read
32 your question.

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18236

1 MR. MICHAEL GERTLER:

2 Yes, sir.

3 THE COURT:

4 I'm going to hear the objection now.

5 MR. WITTMANN:

6 You just excluded these documents, now
7 he's framing a question right from the
8 documents and asking him if he didn't say
9 that.

10 THE COURT:

11 I don't know what case we're talking
12 about in this question. That's why I let Mr.
13 Gertler read the question.

14 MR. MICHAEL GERTLER:

15 In this case.

16 THE COURT:

17 In Scott versus American Tobacco?

18 MR. MICHAEL GERTLER:

19 Yes. Yes.

20 THE COURT:

21 The objection is overruled.

22 But I want you to specify that you're
23 talking about the case that's at trial right
24 now.

25 MR. WITTMANN:

26 That's fine.

27 THE COURT:

28 Okay.

29 MR. WITTMANN:

30 That's fine.

31 (Whereupon the bench conference is
32 concluded at this time.)

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18237

1 THE COURT:

2 The objection to the question is
3 overruled.

4 And, Mr. Gertler, I'm going to read the
5 question back.

6 MR. MICHAEL GERTLER:
7 Yes, sir.
8 THE COURT:
9 And I want you to specify what you mean
10 by "in this case" as soon as I finish reading
11 the question back.
12 MR. MICHAEL GERTLER:
13 Yes, Your Honor.
14 THE COURT:
15 Here is the question, Doctor:
16 "And is that why you expressed the
17 opinion, Doctor, in this case that a
18 cessation program would be important to help
19 smokers, who want to quit, quit smoking?"
20 MR. MICHAEL GERTLER:
21 And this case, Doctor, is the present
22 case, Scott, versus various cigarette
23 companies that we're now involved in.
24 THE COURT:
25 Answer the question, please.
26 THE WITNESS:
27 You know, in the best of all worlds,
28 I have no problem with people having the
29 smoking cessation program.
30 EXAMINATION BY MR. MICHAEL GERTLER:
31 Q. That's your answer, Doctor?
32 A. Yes.

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18238

1 MR. MICHAEL GERTLER:
2 Carl, would you please put up the final
3 section of the article that we were referring
4 to? It's at Page 1150.
5 And, Your Honor, this is the article
6 that we've already published a number of
7 pages from.
8 THE COURT:
9 And the document number is?
10 MR. MICHAEL GERTLER:
11 And the document number is Scott
12 0104.04.
13 May I publish that page, Your Honor?
14 THE COURT:
15 Yes.
16 MR. MICHAEL GERTLER:
17 And, Carl, would you highlight the
18 sentence on the left-hand side, the top first
19 sentence from that article?
20 EXAMINATION BY MR. MICHAEL GERTLER:
21 Q. And read with me, would you, Doctor?
22 "Spirometry results are also a strong independent
23 predictor of morbidity and mortality due to COPD,
24 mortality due to cardiovascular disease, lung
25 cancer, as well as all-cause mortality."
26 Did I read that accurately?
27 A. Yes, you did.
28 Q. And when the authors of that article, which
29 is a consensus recommendation, refer to "morbidity,"
30 they're referring to disease; are they not?
31 A. That's correct.
32 Q. And when they refer to "mortality," they're
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1 referring to death; are they not?
2 A. Yes.
3 Q. And when they refer to "cardiovascular
4 disease," they're referring to heart disease; is
5 that correct?
6 A. Yes.
7 Q. And when they refer to "lung cancer,"
8 obviously, that encompasses lung cancer as we know
9 it, Doctor; is that correct? It's not a specific
10 cell type? It's lung cancer?
11 A. Yes.
12 Q. And, Doctor, isn't that exactly what we're
13 recommending in this case, that spirometry be used
14 to predict for people who want it whether they are
15 traveling down the course to disease and death from
16 those conditions?
17 A. That's what you're proposing. But it's
18 currently not the standard of care in this country.
19 Q. Dr. Spagnolo, is it your opinion that if the
20 doctors from Louisiana, from Ochsner Foundation
21 Hospital, recommend that Louisiana smokers receive
22 periodic spirometry tests, if they choose to, to
23 predict those diseases, are you telling this jury
24 that those doctors would be violating the standard
25 of care in Louisiana?
26 A. I'm -- At the moment, I'm not aware that that
27 is the standard of care in Louisiana. It's
28 certainly not the standard of care in the United
29 States. If the State of Louisiana decides to make
30 that their standard of care, that's up to them.
31 Q. Doctor, you're saying that if Tulane, LSU and
32 Ochsner, our premier medical institutions, operate
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1 under what is recommended in this consensus
2 statement, that as far as you know, they are not
3 violating any standard of care; isn't that true?
4 A. They may not be violating the standard of
5 care in their community. I'm telling you that's not
6 the standard of care in the United States. Nor is
7 it being recommended by any major group.
8 Q. And, Dr. Spagnolo, you've never been licensed
9 in Louisiana; have you?
10 A. No, sir.
11 Q. Or practiced in Louisiana?
12 A. I have not.
13 Q. And don't know the first thing about our
14 standard of care; do you?
15 A. Well, I don't know all the specifics of your
16 standard of care, no.
17 Q. Now, Doctor, I'm going to try to make this
18 quicker, if I can. I feel like if I give you the
19 title of an article, that if you recognize it, and
20 I'm going to ask you if that's exactly the same
21 recommendation they make in these other articles as
22 I read to you from the first one, I won't have to
23 put each one up on the screen, okay?
24 A. That seems okay to me.
25 Q. All right, sir. Published Scott Exhibit
26 0128.04 in a journal by the name of the Postgraduate

27 Medicine journal, do you recognize that journal?
28 A. Yes, I do.
29 Q. Published December of 2000, Doctor, an
30 article entitled "Chronic Obstructive Pulmonary
31 Disease" by Kristin Fraser and Kenneth Chapman, do
32 you recognize those authors?
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18241

1 A. Do I know them? Is that the question?
2 Q. Yes.
3 A. No, I don't know these people.
4 Q. Do you recognize their article?
5 A. I don't believe I've seen this article.
6 Q. Now, Doctor, this article was published in a
7 peer-reviewed journal for primary care physicians.
8 That's this journal; correct?
9 A. I don't know if this journal --
10 Q. All right, Doctor, I'll withdraw.
11 A. I don't know if this is specifically for
12 primary care physicians.
13 Q. I'll withdraw.
14 MR. MICHAEL GERTLER:
15 Please put it up quickly. That's
16 article Scott 0128.04, the title page.
17 Your Honor, may I publish?
18 MR. LONG:
19 No objection.
20 THE COURT:
21 You may publish it.
22 MR. MICHAEL GERTLER:
23 Could you enlarge, yes, that top?
24 EXAMINATION BY MR. MICHAEL GERTLER:
25 Q. Do you see that? Do you recognize that?
26 A. I can see it now, yes.
27 Q. And you see it's the "Practical Peer-Reviewed
28 Journal for Primary Care Physicians," Doctor?
29 A. I do.
30 MR. MICHAEL GERTLER:
31 Okay. Now, turn to the next page.
32 And please, Your Honor, may we publish
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18242

1 Page 2 in connection with this document, Your
2 Honor?
3 THE COURT:
4 You may publish it.
5 MR. MICHAEL GERTLER:
6 Would you highlight that paragraph?
7 EXAMINATION BY MR. MICHAEL GERTLER:
8 Q. Read with me, Doctor.
9 "The tobacco-related damage responsible for
10 COPD deaths takes place insidiously...." What does
11 "insidiously" mean, Doctor? Doesn't that mean
12 before symptoms?
13 A. To me, it means it takes place slowly.
14 Q. Okay. "Insidiously" doesn't mean before
15 symptoms occur in your vocabulary?
16 A. I would interpret that it means slowly over
17 time.
18 Q. It says that it "...takes place insidiously
19 over decades, and symptoms occur only after injury

20 is substantial and irreversible."
21 That's different from your opinion; isn't it,
22 Doctor?
23 A. My opinion is that people with COPD have
24 symptoms.
25 Q. And this says symptoms only occur after the
26 damage is substantial and irreversible. Is that the
27 same as your opinion?
28 A. Well, I said my opinion was that it occurs
29 after they develop symptoms. And if you continue to
30 smoke, the damage will not be reversible and will
31 continue.
32 Q. And it goes on to say, "Therefore, prevention
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18243

1 cannot be overemphasized."
2 Did I read that correctly, Doctor?
3 A. Yes.
4 MR. MICHAEL GERTLER:
5 Now, let's see. Quickly go to Page 10,
6 will you, please?
7 May I publish Page 10, Your Honor?
8 THE COURT:
9 You may publish it.
10 MR. MICHAEL GERTLER:
11 Would you highlight under "Summary and
12 Conclusions," please, Carl?
13 EXAMINATION BY MR. MICHAEL GERTLER:
14 Q. And specifically where it says, Doctor, "It
15 is imperative to diagnose COPD early in patients
16 with or without respiratory symptoms," you agree
17 with that?
18 A. I can only -- I don't agree with it the way
19 it's stated, no, because all the patients who have
20 COPD, in my experience, have symptoms.
21 Q. Okay. By the way, you have an article that
22 says that?
23 A. The definition implies everybody has
24 symptoms.
25 Q. Okay. You don't have anything you brought to
26 court here to show the jury that says what you're
27 saying; do you?
28 A. No, but I told you those definitions are the
29 American Thoracic Society definitions.
30 Q. Now, Doctor, it goes on to say, "This
31 requires office spirometry performed periodically in
32 persons at risk, such as long-time cigarette smokers
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18244

1 over 40 years of age."
2 You disagree with that?
3 A. That's the opinion of these authors.
4 Q. And then it proceeds to end with "Many of
5 these treatments have the potential to alleviate
6 symptoms, reduce healthcare utilization, improve
7 quality of life, and extend survival."
8 Did you come here to tell this jury that
9 what's contained in that peer-reviewed journal is
10 not correct?
11 A. The only thing that's been shown to increase
12 and slow the progression of disease is to stop

13 smoking.
14 Q. Does that mean you disagree with what's
15 contained in that peer-reviewed journal that I just
16 read to you?
17 A. I disagree with the opinion of these two
18 authors.
19 Q. Dr. Spagnolo, I'm going to try with the next
20 article just to give you the title and give you the
21 authors and see if you can recognize it for what I'm
22 going to ask you.
23 It's the Journal of Respiratory Diseases. Do
24 you recognize that?
25 A. Yes.
26 Q. It's a peer-reviewed journal?
27 A. Yes.
28 Q. It's dated August 20, 2000?
29 A. Yes.
30 Q. And, Doctor, in connection with that abstract
31 of that particular journal for that date and title,
32 "Keys To the Early Detection and Management of
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18245

1 COPD," do you recognize that article?
2 A. I don't recognize the article. I don't -- I
3 don't know -- I don't think I've read that article.
4 Q. Didn't you go to the jury in the other
5 tobacco case, and these articles that I'm now
6 discussing with you were discussed with you in the
7 other tobacco case?
8 A. I don't remember. It could have been.
9 Q. Yes.
10 You're not denying that; are you?
11 A. I just don't remember.
12 Q. There's nothing wrong -- and I don't mean to
13 be facetious, and I apologize in advance -- but you
14 are not on any medication or any problem that would
15 affect your memory; are you, Doctor?
16 MR. WITTMANN:
17 Objection, Your Honor.
18 THE COURT:
19 Overruled. Answer the question if
20 you're able to.
21 A. No, I'm not.
22 MR. MICHAEL GERTLER:
23 Now, Carl, would you quickly flip up
24 0096.04?
25 And, Your Honor, may I publish?
26 THE COURT:
27 Any objection?
28 MR. LONG:
29 No objection.
30 THE COURT:
31 You may publish it.
32 MR. MICHAEL GERTLER:

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18246

1 All right. That Journal of Respiratory
2 Disease, would you publish the first page and
3 highlight just the last two sentences?
4 EXAMINATION BY MR. MICHAEL GERTLER:
5 Q. Read with me, Doctor. "It is our belief that

6 all current and former smokers should undergo
7 periodic spirometric testing."
8 Do you disagree with that, sir?
9 A. Yes, I do.
10 Q. And it goes on to say, "This article
11 summarizes the recommendations of a working group of
12 primary care specialists and pulmonologists."
13 Doctor, were you invited to join that working
14 group so you could express your opinion about these
15 diseases?
16 A. Probably not.
17 Q. Let's go on.
18 It says, "It is designed to guide...."
19 And we'll go to the next page, please, Carl.
20 THE COURT:
21 You may publish it.
22 MR. MICHAEL GERTLER:
23 Thank you, Judge.
24 EXAMINATION BY MR. MICHAEL GERTLER:
25 Q. "...primary care clinicians in the early
26 detection and stepwise management of COPD, to
27 improve airflow, prevent progression and
28 complications, and improve quality of life."
29 You agree with that, Doctor?
30 A. Only if they would have added that you have
31 to stop smoking.
32 Q. Well, of course, Doctor, you would make every
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18247
1 effort, wouldn't you, to provide the patient who
2 wants to stop with an adequate program to assist
3 them; wouldn't you, Doctor?
4 A. I would have no objections.
5 Q. Now, Doctor, you are aware that part of what
6 we have asked for in this case is a well-designed
7 cessation prevention program?
8 A. Yes.
9 Q. And you're in favor of that; aren't you?
10 A. I said earlier I have no objections to any
11 program to help people stop smoking.
12 Q. Do you have objections to help people
13 understand whether they are suffering from an
14 undiagnosed disease related to smoking?
15 A. No.
16 Q. Let's assume, Doctor, that I walk into your
17 office, I've been a 40-year or a 20 pack/year
18 smoker, Doctor, my best friend just died of lung
19 cancer and I came to you and I said, "Doctor, I'm
20 worried about my condition. There is a program out
21 there."
22 Would you, Doctor, refuse to provide me with
23 a CT scan if I requested it to determine whether I
24 had underlying disease?
25 A. What I would -- If you came to me and I had
26 an opportunity to examine you closely, check you
27 out, and found that you had no symptoms and no
28 abnormalities on a physical examination, I would, if
29 you were concerned about that, I would encourage you
30 to join one of the studies conducted by the National
31 Institute of Health or some other organization
32 that's conducting a very good study to answer that
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1 question.

2 Q. Or if we had it for Louisiana citizens, would
3 you encourage him to go to the program so he could
4 determine whether he has underlying disease?

5 A. If it's a valid scientific program that's
6 looking at that question, I would encourage them to
7 join that program.

8 Q. Now, Doctor, --

9 Scott Exhibit 0159.04, Your Honor.

10 -- I want to know, Doctor, did you tell this
11 jury that spirometry is a very complicated
12 procedure?

13 A. No, I'm not sure I said it was a very
14 complicated procedure. I said it was sometimes
15 interpreting the data can get very complicated.

16 Q. Because you know, don't you, Doctor, that
17 spirometry is a very uncomplicated procedure that
18 can easily be incorporated by a primary care
19 physician into the routine physical examination of
20 the patient?

21 A. Spirometry, as I alluded to yesterday, the
22 American Thoracic Society has the guidelines on how
23 to perform spirometry. And I believe those
24 guidelines may be as long as twenty pages. It's a
25 very technical test. It's not difficult to do if
26 you follow those guidelines. The interpretation of
27 the results can sometimes be difficult.

28 MR. MICHAEL GERTLER:

29 Would you put up 0159.04?

30 Your Honor, may we publish?

31 THE COURT:

32 Any objection?

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(504) 525-1753

18249

1 MR. LONG:

2 No objection.

3 THE COURT:

4 You may publish it.

5 MR. MICHAEL GERTLER:

6 Thank you, Your Honor.

7 Carl, would you highlight the section on
8 spirometry under the abstract?

9 EXAMINATION BY MR. MICHAEL GERTLER:

10 Q. Doctor, read with me, would you please.

11 "Spirometric measurements of lung function are vital
12 signs that, unfortunately, are not as widely used as
13 blood pressure or cholesterol testing. Spirometry
14 is an uncomplicated procedure that can easily be
15 incorporated by primary care physicians into routine
16 physical examinations, especially now that simple
17 hand-held spirometers suitable for all offices are
18 available."

19 Did I read that correctly?

20 A. Yes, you did.

21 Q. Do you have one of those simple hand-held
22 spirometers?

23 A. No, we don't use them because we don't think
24 they're reliable.

25 Q. You're familiar with them, though; aren't
26 you?

27 A. Yes.
28 Q. And you deny what this author said in this
29 article?
30 A. In my experience, yes.
31 Q. I think you told the jury you've done --
32 what? -- hundreds or thousands of these
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18250

1 spirometries?
2 A. Well, I don't remember what -- I think we've,
3 over the thirty years, it's probably been in the
4 neighborhood of probably several thousand in our
5 laboratories.
6 Q. Well, have you ever lost a patient by giving
7 them a spirometry?
8 A. No. I said it's a fairly safe procedure.
9 I've only seen people faint. I've never seen
10 anybody get more than that.
11 Q. And you've been able to do it and interpret
12 it; right?
13 A. I've been doing -- I'm considered an expert
14 in it, yes.
15 Q. Do you have any reason to believe that
16 pulmonologists in Louisiana who work at Ochsner,
17 Tulane and LSU aren't just as competent as you at
18 performing spirometry?
19 A. I'm sure some of them are.
20 Q. Do you know of anyone that isn't?
21 A. I don't know everybody here. I assume those
22 people are competent and qualified.
23 Q. Now, Doctor, you have actually written
24 yourself on spirometry in a published case,
25 "Evaluation and Therapy of Pulmonary Problems in
26 Surgical Patients"? Do you recognize that title?
27 A. Yes.
28 Q. Doctor, am I correct that you stated in this
29 one article on pulmonary function studies, the
30 following, quote, "Pulmonary function tests should
31 be performed in all patients undergoing thoracic
32 surgery having chest wall deformities or with a
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18251

1 history of cigarette smoking"?
2 A. I believe in 1982, I did say that.
3 Q. Did you change your opinion on that, Doctor?
4 A. People that are undergoing surgery, I
5 believe, should have spirometry, yes.
6 Q. Just because they're cigarette smokers?
7 A. Yes.
8 Q. You haven't changed your opinion on that;
9 have you?
10 A. If they're going to go underneath the knife,
11 no, I think they should have spirometry.
12 Q. Now, Doctor, you also did a screening over at
13 the V.A.; didn't you?
14 A. I believe we had a program that the hospital
15 wanted us to do spirometry on people who were
16 working at the hospital, yes.
17 Q. People who were perfectly normal but who were
18 working in an asbestos environment; isn't that true?
19 A. As I recall, these were -- these were some

20 asbestos workers who were working with asbestos.
21 And I think the hospital was concerned, and so they
22 told us that they wanted to do spirometry on those
23 people.
24 Q. So you did what your hospital told you they
25 wanted to do because you also thought it was a good
26 idea to screen asymptomatic people who were exposed
27 to high-risk exposures; isn't that true?
28 A. Well, I didn't have any choice. The hospital
29 said we had to do it, so we did it.
30 Q. Well, they made you do it, Doctor?
31 A. Well, our laboratory is in the hospital. And
32 this was done at the V.A. Medical Center. And
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18252

1 that's why we did it.
2 Q. Now, Doctor, you did it because it's a good
3 idea, isn't it, to give people who are exposed to
4 high-risk toxins information about whether they are
5 going to be getting sick and should be removed from
6 that exposure; isn't that the reason?
7 MR. LONG:
8 Objection. Repetitious.
9 A. And in this case, it was related to asbestos.
10 THE COURT:
11 Is that an objection?
12 MR. LONG:
13 Objection. Repetitious.
14 THE COURT:
15 Overruled. Answer the question, if
16 you're able to.
17 THE WITNESS:
18 Yes. In this case, it was related to
19 asbestos exposure.

20 EXAMINATION BY MR. MICHAEL GERTLER:
21 Q. And don't you think it's a good idea to give
22 the patient the information so the patient can act
23 on the information in whatever way they can to
24 prevent further exposure?
25 A. I, frankly, don't know who got the
26 information from these tests, whether it went to the
27 hospital or to the patient.
28 Q. So when you got these tests performed on
29 asymptomatic patients who were exposed to this toxic
30 dust, you as a physician didn't make it a point to
31 see that the patient had the information that you
32 had gathered?
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18253

1 A. I wasn't conducting that study. That was
2 another member of my division. So I didn't -- I
3 didn't actually see these patients.
4 Q. Yes.
5 But you knew these patients were exposed to
6 asbestos; right?
7 A. They claimed they were exposed, yes.
8 Q. Oh, they claimed they were.
9 A. And they were probably exposed.
10 Q. Yes.
11 Now, Doctor, that's not unusual, is it, to
12 give people information when they're exposed to

13 toxic substances? You know that; don't you?
14 A. That's true.
15 Q. And, in fact, OSHA requires that employers
16 who expose people to toxic substances pay for tests
17 to screen those people and monitor those people for
18 disease? You know that; don't you?
19 MR. WITTMANN:
20 Objection, Your Honor. Relevance.
21 THE COURT:
22 Overruled. Answer the question, if
23 you're able to.
24 A. I'm not aware of all the OSHA
25 recommendations. I think they do suggest screening
26 in certain situations.
27 EXAMINATION BY MR. MICHAEL GERTLER:
28 Q. And the party that exposed the people is the
29 party that pays for the screening test; isn't that
30 true?
31 MR. WITTMANN:
32 Objection, Your Honor.
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18254

1 MR. LONG:
2 Objection, Your Honor. Relevance.
3 MR. MICHAEL GERTLER:
4 Your Honor, we'd like to --
5 THE COURT:
6 Just a moment, please. I have an
7 objection.
8 MR. MICHAEL GERTLER:
9 I'm sorry.
10 THE COURT:
11 Sustained. Don't answer that question.
12 Next question, please.
13 EXAMINATION BY MR. MICHAEL GERTLER:
14 Q. Dr. Spagnolo, don't you consult for the
15 United States Government?
16 A. Yes, I do.
17 Q. And don't you consult in the division of
18 occupational workers' compensation?
19 A. Yes, I do.
20 Q. And don't you become aware in that
21 consultation with exposures like asbestos and silica
22 and mine dust and other toxic exposures?
23 A. I'm not sure how you mean "involved."
24 Q. No, I say don't you become aware of relevant
25 laws pertaining to exposures like asbestos, silica,
26 mine dust and things like that?
27 A. Only in the context of my reading of the
28 literature.
29 MR. MICHAEL GERTLER:
30 Your Honor, I'd like to put up, please,
31 Exhibit Number SS2 at this time on Your
32 Honor's screen and on the screen of counsel.
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18255

1 THE COURT:
2 Is the number SS2?
3 MR. MICHAEL GERTLER:
4 Actually, it is, Your Honor.
5 It's a demonstrative, I'm sorry, Your

6 Honor. SS2 is a demonstrative.
7 THE COURT:
8 Approach the bench, please.
9 (Whereupon a bench conference is held at
10 this time as follows:)
11 THE COURT:
12 Mr. Long, you were standing up.
13 MR. LONG:
14 I've never seen this thing before. They
15 haven't provided it to us.
16 MR. LOUIS GERTLER:
17 We absolutely provided it to you.
18 MR. LONG:
19 When?
20 MR. LOUIS GERTLER:
21 This morning.
22 MR. LONG:
23 In this huge box?
24 MR. LOUIS GERTLER:
25 We had to provide cross-examination
26 documents and demonstratives on the morning
27 of cross. We complied with that order. We
28 got the same thing in our files.
29 THE COURT:
30 Well, let me say this to you, Mr.
31 Gertler. If it was in this, I think they're
32 much prejudiced by that. And I'll give you
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18256

1 an opportunity to look at it, Mr. Long. And
2 if you --
3 MR. LONG:
4 Well, we got it -- when we give them
5 demonstratives, we say here are the
6 demonstratives, here are the exhibits. We
7 got this huge box of four things that they
8 admit was for several different witnesses.
9 Secondly, we haven't had a chance to
10 look at it, haven't had a chance to --
11 THE COURT:
12 I don't know. Maybe it's in here, but
13 we don't have any information.
14 MR. LOUIS GERTLER:
15 You don't have it?
16 MR. LONG:
17 There is no source on it. Plus, to the
18 extent they're attempting to use some OSHA
19 regulations to prove -- Where does this come
20 from?
21 MR. LOUIS GERTLER:
22 It comes from exactly IARC, which I
23 think everyone here will agree is an
24 authoritative source from the OSHA rules.
25 MR. LONG:
26 Is this a chart out of an OSHA
27 document --
28 MR. LOUIS GERTLER:
29 Yes.
30 MR. LONG:
31 -- or is it a chart that you --
32 MR. LOUIS GERTLER:

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1 No, it says right here exactly where it
2 came from. We can go through all the
3 documents, if you want. We're trying to
4 summarize it.
5 MR. LONG:
6 Are you telling me this is a photocopy
7 of a chart?
8 MR. LOUIS GERTLER:
9 No, we made this chart.
10 MR. LONG:
11 Okay. Then I object to it. We haven't
12 had a chance to check the accuracy. It's got
13 a bunch of stuff -- I don't even know what it
14 is. It's OSHA-specific -- It's confusing,
15 it's not sourced, I haven't seen it.
16 MR. LOUIS GERTLER:
17 It's sourced and it's not very
18 confusing.
19 MR. LONG:
20 Your Honor, are we required --
21 THE COURT:
22 Mr. Gertler, let me ask you a question.
23 How and when was that provided to the
24 defendants specifically?
25 MR. LOUIS GERTLER:
26 I will find out exactly how it was
27 provided. But I have the source materials
28 right here, Your Honor. We can give it to
29 them.
30 THE COURT:
31 Are you telling me you can't answer my
32 question?

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1 MR. LOUIS GERTLER:
2 I cannot answer right now without
3 checking with the people that actually
4 provided them.
5 THE COURT:
6 Do you think it's in one of those boxes?
7 MR. LONG:
8 Your Honor, I would add --
9 THE COURT:
10 Wait just a minute.
11 Let me get an answer to my question,
12 please.
13 MR. LOUIS GERTLER:
14 Your Honor, I cannot answer. I'd have
15 to check with the people who actually did the
16 serving.
17 THE COURT:
18 Do that.
19 MR. LOUIS GERTLER:
20 Okay.
21 THE COURT:
22 Do you want to add something?
23 MR. LONG:
24 No, I'll wait and see what he says.
25 (Whereupon a discussion was held off the
26 record.)

27 THE COURT:
28 You didn't see it?
29 MR. BRUNO:
30 No, I didn't see it. All I saw were
31 Scott exhibit numbers. We're going to have
32 to research this for you.
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18259

1 THE COURT:
2 Mr. Gertler?
3 MR. LOUIS GERTLER:
4 Yes, Your Honor.
5 Apparently, I'm embarrassed to say this,
6 but the PLC office apparently delivered. No
7 one is here to answer my questions about
8 where it is. So we will move on to something
9 else. And if the cross extends to tomorrow,
10 we will provide it tomorrow morning.

11 THE COURT:
12 Well, I'm going to continue to get
13 objections to these demonstratives if you
14 can't show where they were delivered.
15 MR. LOUIS GERTLER:
16 Right.
17 THE COURT:
18 And we wasted some time with this one.
19 MR. LOUIS GERTLER:
20 Right. I apologize.

21 THE COURT:
22 I don't know where you're going. But
23 that's the reason for the rule, to avoid
24 this. So I'm going to sustain the objection
25 to this one and we'll deal with the others as
26 and when they come up.

27 MR. LONG:
28 Your Honor, there's a separate
29 provision -- and The Special Master may be
30 able to find where it is -- that allows --
31 that requires demonstratives to be used on
32 cross I think it's 24 hours in advance.

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18260

1 Demonstratives aren't to be included in the
2 thing you delivered in the morning. There's
3 a separate rule, I think it's a letter from
4 The Special Master, on demonstratives.

5 THE COURT:
6 Let me check with him.

7 MR. LONG:
8 That's why we sent you demonstratives on
9 people we were going to cross. That's the
10 rule.

11 THE COURT:
12 Let's find it.
13 MR. LOUIS GERTLER:
14 We can use the underlying documents.
15 It's no big deal. Just trying to expedite
16 things. We'll just go through the OSHA
17 documents.

18 MR. BRUNO:
19 All the OSHA documents are listed.

20 MR. LOUIS GERTLER:
21 Right, they're all listed.
22 MR. LONG:
23 They're in all the stuff we got today in
24 the box for the week?
25 MR. LOUIS GERTLER:
26 Yes.
27 THE COURT:
28 (Reviews document.)
29 MR. LONG:
30 There's another letter that requires a
31 change of demonstratives 24 hours in advance.
32 MR. LOUIS GERTLER:
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18261

1 If you can find that letter.
2 MR. LONG:
3 There's another letter order.
4 THE COURT:
5 Let's muddle through the rest of the day
6 as best we can and we'll try to work this
7 out.
8 (Whereupon the bench conference is
9 concluded at this time.)
10 THE COURT:
11 Mr. Gertler, next question, please.
12 MR. MICHAEL GERTLER:
13 Yes.

14 EXAMINATION BY MR. MICHAEL GERTLER:
15 Q. Doctor, are you familiar with the
16 organization called IARC?
17 IARC, I-A-R-A-C or I-A-R-C?
18 A. I'm sorry. I'm not sure I could hear you.
19 Q. The international association that classifies
20 exposures to various chemicals as being either
21 carcinogenic in humans or not?
22 A. I've heard of, yes, I have heard of the
23 organization. I just couldn't hear you.
24 Q. Oh, you couldn't hear me.
25 Are you familiar with that listing of
26 carcinogens that are contained in cigarette smoke
27 that are identified by IARC as carcinogens in human
28 beings?
29 A. I haven't seen that listing for a long time,
30 so all I -- I can't tell you what's on that listing.
31 There are probably a lot of things on that listing,
32 but I haven't seen it in a long time and I'm not an
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18262

1 expert in that area.
2 Q. I see. You came here to testify about
3 cancer; didn't you, Doctor?
4 A. Yes.
5 THE COURT:
6 Someone ask my law clerk, Michelle
7 Mouton, who just left through that side door,
8 to come back in here and talk to me, please.
9 You may continue, Mr. Gertler.
10 MR. MICHAEL GERTLER:
11 Thank you, Judge.
12 EXAMINATION BY MR. MICHAEL GERTLER:

13 Q. Are you aware, Doctor, that the cancer-
14 causing chemicals in tobacco smoke are listed by
15 OSHA as exposures that people have to be screened
16 against?
17 A. Am I aware of the list?
18 Q. Yes.
19 A. I -- There's a list. I haven't seen the
20 list.
21 Q. Doctor, do you know whether there is a
22 cancer-causing chemical in cigarette smoke called
23 acrylonitrile? Have you ever heard of that?
24 A. There may be. I'm not familiar with that
25 chemical.
26 Q. Well, if I asked you about all the cancer-
27 causing chemicals, you wouldn't be able to tell me
28 one way or the other; correct?
29 A. Well, I'm not a biochemist. I know there are
30 cancer-causing chemicals in cigarette smoke and I
31 know that it can cause cancer, but I can't list you
32 all the chemicals.
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18263

1 Q. Can you tell this jury whether OSHA requires
2 screening for people who are exposed to those
3 cancer-causing chemicals that are contained in
4 cigarette smoke?
5 MR. WITTMANN:
6 Objection, Your Honor. May I approach?
7 THE COURT:
8 Yes.
9 (Whereupon a bench conference is held at
10 this time as follows:)
11 THE COURT:
12 Mr. Wittmann.
13 MR. WITTMANN:
14 The permissible exposure limits
15 specified by OSHA with respect to chemicals
16 are totally different from the insignificant
17 quantities of chemicals in cigarette smoke.
18 I think it's totally irrelevant to talk about
19 what OSHA prescribes for workplace exposure
20 to chemicals and trying to compare that to
21 the minimal exposure that occurs from the
22 smoking of a cigarette. I think it's just
23 improper cross-examination.
24 MR. MICHAEL GERTLER:
25 And so I would say, Your Honor, Mr.
26 Wittmann is testifying. That there are no
27 exposure limits for those chemicals. If
28 there are, he can redirect on that issue.
29 THE COURT:
30 The objection is overruled. That's a
31 proper subject for redirect.
32 I'm going to instruct the witness to
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18264

1 answer the question, and I'll read it back to
2 him.
3 (Whereupon the bench conference is
4 concluded at this time.)
5 THE COURT:

6 The objection is overruled, Doctor.
7 And I'll read the question back to you:
8 "Can you tell this jury whether OSHA requires
9 screening for people who are exposed to those
10 cancer-causing chemicals that are contained
11 in cigarette smoke?"

12 THE WITNESS:

13 No, I can't tell you. I cannot tell you
14 that.

15 EXAMINATION BY MR. MICHAEL GERTLER:

16 Q. All right, Doctor. May I see your beads? Do
17 you have the beads that you had passed out to the
18 jury? Just take a moment, Doctor. I'm just about
19 finished.

20 These beads, Doctor, is it fair to say that
21 every size on this strand is picked up by a CT scan
22 of the type that we are proposing in this case?

23 A. Yeah, with pretty -- Yeah, the little teeny,
24 teeny, teeny, tiny one, the CT may not pick all
25 those up but it may occasionally pick them up.

26 Q. Well, certainly, you will agree, Doctor, that
27 it is the best device available to science today for
28 picking up all of these various sizes of tumors?

29 A. CT can pick up small, small nodules.

30 Q. And X-rays don't necessarily pick up those
31 small nodules; correct?

32 A. That's correct.

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18265

1 Q. And what you told this jury is that size
2 doesn't matter? Any of these particles -- Size
3 doesn't matter, didn't you say that to the jury?

4 A. I said that size does not mean early disease.

5 Q. So if there's early disease in this bead that
6 has not spread yet, it would be very important to
7 find that bead in someone who is interested in their
8 own health; wouldn't it?

9 A. This is why the NIH is doing the study: To
10 find out if it is very important. That's why I'm
11 here. That's why they're doing the study.

12 Q. And the only device that can pick up that
13 disease in that bead is the type of device we're
14 proposing for this class; isn't that true?

15 A. At the moment, the CT scan will pick up small
16 lesions.

17 Q. And, Doctor, if we don't do that for that
18 person, if we don't pick up that tumor that's
19 malignant as stage IA in that patient, that patient
20 is going to die from lung cancer; isn't that the
21 truth, Doctor?

22 A. We don't know that yet. That's why we're
23 waiting to find out what the NIH study says, whether
24 that will prevent people from dying from lung
25 cancer.

26 Q. Doctor, can't you tell this jury if a person
27 has a IA malignant tumor of this size in their lung
28 and nothing is done, it is more likely than not that
29 person's going to die from that malignancy?

30 A. If that tumor has the potential to
31 metastasize -- and not all nodules do -- and it's
32 not picked up, if it has that potential to spread,
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1 and it's not picked up, that may be -- that is true.
2 Q. That is true.
3 So all of these tumors have potential to
4 spread; don't they?
5 A. Some do, some don't. We don't know.
6 Q. All the ones you talked to this jury about,
7 didn't they have potential to spread?
8 A. They all -- They may. Each tumor is
9 individual. All tumors don't necessarily have
10 potential; but those that do will, sure.
11 Q. The only hope that patient has who has that
12 size malignant tumor in their lung is to have it
13 surgically removed before it metastasized; true?
14 A. That's why we're doing the study, to find
15 that out.
16 Q. You don't have to do a study to know that;
17 don't you? That's basic medical science; isn't it,
18 Doctor?
19 A. Well, there's a lot of controversy over
20 whether CT scanning is going to save lives, so
21 that's why we're going to do the study.
22 Q. Well, I'm asking you --
23 A. That's already why it's in progress.
24 Q. I'm asking you as a pulmonologist who came to
25 talk to this jury about cancer and CT, if you can
26 express your own medical opinion that the person who
27 has that sized malignancy at stage I, their only
28 hope of survival is to surgically remove it before
29 it spreads?
30 A. Is to take it out.
31 Q. Whose beads were these?
32 A. Those are mine.

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18267

1 Q. Oh, those were yours. Okay.
2 And, Doctor, isn't that what the medical
3 articles say? Well, I'll rephrase that, Doctor.
4 You gave this jury an article called
5 "Screening for Lung Cancer: The Guidelines." Do
6 you remember that?
7 A. Yes, I did.
8 MR. MICHAEL GERTLER:
9 All right. Could you put that back up
10 for the doctor, please? It's LR-2268. It's
11 on the screen.
12 Your Honor, may I publish?
13 THE COURT:
14 Who said that?
15 THE SPECIAL MASTER:
16 Mr. Gertler.
17 MR. MICHAEL GERTLER:
18 This has already been admitted, Your
19 Honor, and used by the defendants with this
20 witness.
21 THE COURT:
22 Is that agreed to?
23 MR. SCHNEIDER:
24 Yes.
25 MR. WITTMANN:
26 That's correct, Your Honor.

27 MR. MICHAEL GERTLER:
28 Would you put up the first page, the
29 front page?
30 THE COURT:
31 You may publish it.
32 MR. MICHAEL GERTLER:
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18268

1 Oh, I'm sorry. Thank you, Judge.
2 And would you highlight the first two
3 sentences in the box, please? And enlarge
4 those, Carl.
5 EXAMINATION BY MR. MICHAEL GERTLER:
6 Q. Now, let's read it together, Doctor.
7 "Although virtually all individuals with
8 advanced lung cancer succumb to the disease, a
9 substantial portion of individuals diagnosed at an
10 earlier stage can be cured."
11 Is that what you meant when you said
12 surgically removed?
13 A. Yes.
14 Q. Don't you agree, Doctor, with the basic
15 premise that earlier is better for lung cancer in
16 patients who are smokers or former smokers?
17 A. Earlier is better.
18 Q. Thank you, Doctor.
19 Now, Doctor, I'm going to try to, again,
20 shortcut this. But you talked about overdiagnosis
21 with this jury. Overdiagnosis means that you're
22 finding these small tumors with a CT scan that
23 really may be innocuous, innocent, never go on to
24 cancer?
25 A. I think it was alluded to on several slides.
26 And I indicated that that's a very controversial
27 area.
28 Q. But the most recent publications with regard
29 to overdiagnosis indicate that overdiagnosis is very
30 rare among screened, diagnosed cases of lung cancer.
31 Are you familiar with that?
32 A. I'm not sure which article you're talking
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18269

1 about.
2 Q. Well, let's look at -- Well, didn't you
3 mention Dr. Henschke?
4 A. Yes, we mentioned Dr. Henschke.
5 Q. Did you mention her 2003 article entitled
6 "Small Stage I Cancers of the Lung: Genuineness and
7 Curability"?
8 A. We mentioned Dr. Henschke's study, yes. This
9 may have been part of it, but I'm not sure we
10 mentioned this specific --
11 Q. Now, you know, Doctor, you didn't mention
12 this specific study --
13 MR. LONG:
14 Objection, Your Honor.
15 EXAMINATION BY MR. MICHAEL GERTLER:
16 Q. -- don't you?
17 THE COURT:
18 The objection is overruled.
19 The form of the question could have been

20 better, Mr. Gertler.
21 EXAMINATION BY MR. MICHAEL GERTLER:
22 Q. Isn't it a fact that you did not mention that
23 article to this jury in your direct testimony?
24 MR. LONG:
25 Objection, Your Honor. Repetitive.
26 THE COURT:
27 Just a moment. I have an objection.
28 MR. LONG:
29 Sorry. Repetitive.
30 THE COURT:
31 Overruled. Answer the question.
32 And the question is: "Isn't it a fact
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18270

1 that you did not mention that article to this
2 jury in your direct testimony?"
3 THE WITNESS:
4 I think that is true.
5 EXAMINATION BY MR. MICHAEL GERTLER:
6 Q. And, Doctor, are you familiar with an article
7 by Gary Strauss that was reported in 2002 called
8 "The Mayo Lung Cohort: A Regression Analysis
9 Focusing on Lung Cancer Incidence and Mortality"?
10 Are you familiar with that?
11 A. I believe I've seen it.
12 Q. Did you mention that one to the jury?
13 A. No, I don't believe we did.
14 Q. And that conclusion in that article, does it
15 not, say, Doctor, that this analysis demonstrates
16 that the data are inconsistent with the
17 overdiagnosis hypothesis?
18 A. I said that this whole issue of this
19 overdiagnosis is quite controversial.
20 Q. Now, Doctor, you also told this jury, did you
21 not, sir, that there could be very serious problems
22 with diagnosing a tumor to determine whether it's
23 malignant or benign?
24 A. I did.
25 Q. Yes.
26 Do you know what I found, Doctor? And tell
27 me if this is correct. You wrote in an article in
28 Chest about a new, brand-new procedure that could
29 determine malignancy or benignity without any
30 invasive testing.
31 A. Which article are you quoting?
32 Q. Well, I'm quoting from Chest. And it says
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18271

1 Bloom and colleagues, and it's written by Spagnolo,
2 and it makes reference to something called Tc
3 Depreotide.
4 A. That, I wrote an editorial about a new test
5 that is being introduced that tries to pick up
6 certain nodules in the lung as a new test. Not as a
7 screening test. But to help the physician make a
8 diagnosis. It's a very new test that's being tried
9 out in sort of a pilot way.
10 Q. Don't you understand, Doctor, that this
11 program we're proposing screens people for nodules?
12 But after they are told and given the information,

13 they go to their physician and discuss with their
14 physician whether there is a diagnostic test --
15 MR. WITTMANN:
16 Objection.
17 EXAMINATION BY MR. MICHAEL GERTLER:
18 Q. -- which should be provided for that person?
19 MR. WITTMANN:
20 Objection, Your Honor. May I approach?
21 THE COURT:
22 Just a moment.
23 Approach the bench, please, Mr.
24 Wittmann.
25 (Whereupon a bench conference is held at
26 this time as follows:)
27 THE COURT:
28 Mr. Wittmann, your objection?
29 MR. WITTMANN:
30 Your Honor, I think that Mr. Gertler
31 seems to be making up the details of the
32 program as he goes. And, you know, we didn't
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18272

1 ask him questions about the details of the
2 program.
3 MR. BRUNO:
4 Well, that's not details of the program.
5 THE COURT:
6 Just a moment.
7 It's Mr. Gertler's opportunity to
8 respond and no one else.
9 MR. BRUNO:
10 I'm sorry.
11 MR. WITTMANN:
12 And that's my point. He's going into
13 what they propose and going into details of
14 the program. We haven't asked --
15 THE COURT:
16 The question was badly phrased. And I
17 think you can do a better job. I suggest you
18 withdraw it and I'll tell the jury to
19 disregard it.
20 Mr. Long wants to say something.
21 MR. LONG:
22 I think the issues he's touching on
23 after they're screened under their plan are
24 Phase II. And they keep telling us we can't
25 talk about this stuff, about what's going to
26 happen under their plan.
27 MR. MICHAEL GERTLER:
28 We have never proposed diagnoses as part
29 of the plan. It is a --
30 THE COURT:
31 The objection to the form of the
32 question is sustained. If you want to make
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18273

1 another objection, you may make another
2 objection.
3 But the issue before this jury is
4 whether or not the defendants pay for a
5 screening program. And I think he wants to

6 demonstrate -- I'm not going to say that.
7 That's none of my business what he wants to
8 demonstrate.

9 (Whereupon the bench conference is
10 concluded at this time.)

11 THE COURT:

12 The objection to the form of the
13 question is sustained. Don't answer that
14 question, Doctor.

15 Next question, Mr. Gertler.

16 EXAMINATION BY MR. MICHAEL GERTLER:

17 Q. Doctor, when you told this jury about that
18 needle that they put in people and about
19 bronchoscopy and all these other procedures that
20 have risks associated with them, those are
21 diagnostic procedures; aren't they, Doctor?

22 A. Yes.

23 Q. That's something the patient talks to his
24 physician about, the physician informs him of the
25 various benefits and risks, and the patient has a
26 right to decide whether to undergo that procedure
27 to diagnose lung cancer; isn't that true?

28 A. If they're willing to take a chance they
29 might die.

30 Q. They might die if they don't diagnose it;
31 right, Doctor?

32 A. That's right.

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18274

1 Q. Yes.

2 And so that is for the patient to decide;
3 isn't it?

4 A. That's right.

5 Q. And, Doctor, what we are proposing here are
6 screening procedures to give the patient the
7 information to go to their doctor; isn't that what
8 you understand we're doing?

9 A. Yes.

10 MR. MICHAEL GERTLER:

11 Okay. Your Honor, at this time I would
12 reoffer the previous exhibit that you were
13 taking under advisement, if I may, Your
14 Honor. And I would close with just one or
15 two questions on that exhibit, if you allow
16 it in.

17 THE COURT:

18 Give me the number, please, Mr. Gertler.

19 MR. MICHAEL GERTLER:

20 Yes. I'm sorry, Judge.

21 THE COURT:

22 If you can.

23 MR. MICHAEL GERTLER:

24 0047.04.

25 THE COURT:

26 I presume the same objections are urged
27 at this point as were urged in the bench
28 conference?

29 MR. LONG:

30 Yes, Your Honor.

31 THE COURT:

32 The objection is sustained. I will not

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1 allow the objection in -- I will not allow
2 that Exhibit 0047.04. The objection is
3 sustained. As I indicated, Mr. Gertler, you
4 may proffer.
5 MR. MICHAEL GERTLER:
6 Yes, Your Honor.
7 In connection with this witness'
8 testimony, Your Honor, I'd like to offer,
9 introduce and file into evidence -- or offer
10 into evidence, I'm sorry, Your Honor, the two
11 articles, cancer articles that I discussed
12 with him just now and identified and he
13 recognized.
14 THE COURT:
15 The numbers, Mr. Gertler?
16 MR. MICHAEL GERTLER:
17 They are Scott Exhibit 0207.04.
18 THE COURT:
19 Any objection?
20 MR. LONG:
21 No, Your Honor.
22 MR. MICHAEL GERTLER:
23 And 0017.04, Your Honor.
24 THE COURT:
25 I thought that's the one you just
26 mentioned.
27 MR. MICHAEL GERTLER:
28 0017.04 is the Henschke article. And
29 0207.04 is the Strauss article from the Mayo
30 lung cohort.
31 THE COURT:
32 Any objection to --

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1 MR. LONG:
2 No, Your Honor.
3 THE COURT:
4 -- 0017.04?
5 No objection. Both of those exhibits
6 will be received.
7 MR. MICHAEL GERTLER:
8 With that, Your Honor, I have no further
9 questions for Dr. Spagnolo.
10 THE COURT:
11 Approach the bench, Counsel.
12 (Whereupon a bench conference is held at
13 this time as follows:)
14 THE COURT:
15 I'm aware that he needs to leave today.
16 I'm not going to hold this jury past 4:15.
17 Do you want to start your redirect today?
18 MR. LONG:
19 I will be finished, I think, by 4:15.
20 THE COURT:
21 Okay.
22 (Whereupon the bench conference is
23 concluded at this time.)
24 THE COURT:
25 Any questions on redirect?
26 MR. LONG:

27 Yes, Your Honor.
28 THE COURT:
29 This is like the Army, hurry up and
30 wait.
31 THE WITNESS:
32 Yes, sir, it sure is.
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18277

1 MR. LONG:
2 Hello, Doctor.
3 THE WITNESS:
4 Hello.
5 THE COURT:
6 Is your mike on, Mr. Long?
7 MR. LONG:
8 I believe it is.
9 (Whereupon a discussion was held off the
10 record.)
11 MR. LONG:
12 Okay. Now it's on.
13 REDIRECT EXAMINATION

14 BY MR. LONG:
15 Q. Doctor, just a few questions.
16 First of all, you were examined by Mr.
17 Gertler about some testimony you gave in the
18 Blankenship case about people who started smoking
19 when they were younger than 17 or 18.
20 Do you recall that?
21 A. Yes.
22 Q. Do you still have the transcript that Mr.
23 Gertler put on the table this morning from
24 Blankenship?
25 A. Yes.
26 Q. Okay. Is that Volume 18-B?
27 A. Yes.
28 Q. Okay. If you could turn to -- I want to talk
29 about that specific testimony that he was asking you
30 about this morning -- this afternoon or this
31 morning. It's at Page 4634.
32 And you remember Mr. Gertler asked you
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18278

1 earlier today that you gave testimony about the
2 lungs not being fully developed until you're 23 and
3 24?
4 A. Yes.
5 Q. And then the next question, the actual
6 testimony was:
7 "You also indicated there is a time
8 difference. Can you explain that?"
9 Right?
10 A. That's what it says here, yes.
11 Q. And then you said:
12 "Well, length of smoking, particularly,
13 started early."
14 And then the next question was: "What
15 do you mean by that, sir?"
16 And your actual testimony was: "If you
17 start smoking at 15 or 16, you have more time
18 to cause damage to those small airways."
19 That was your testimony; correct?

20 A. Yes.
21 Q. And then the next question which Mr. Gertler
22 also asked you about was:
23 "So that if an individual starts earlier
24 and has less mature lungs because they are
25 younger, then the extent to which they are
26 damaged, if at all, can be greater and
27 different than it would be in an adult who
28 first started smoking when they were an
29 adult; correct?"
30 That's not my question. I'm reading
31 somebody else's.
32 But the answer was: "It certainly could
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18279

1 be."
2 A. That's what I said.
3 Q. That's what you said.
4 Okay. You were questioned about an
5 organization, the name I'm trying to recall, IAPAG
6 or the organization Mr. Gertler was questioning you
7 about on these documents that you've never heard of.
8 A. Yes.
9 Q. And I think you said you knew one of the
10 individuals whose name was on this document but
11 you'd never heard of that organization.
12 A. That's correct.
13 Q. And as far as you know, you have never worked
14 directly for The Tobacco Institute; have you?
15 A. Correct.
16 MR. MICHAEL GERTLER:
17 Your Honor, I object to the leading
18 nature of these questions.
19 THE COURT:
20 Overruled. Answer the question, if
21 you're able to.
22 THE WITNESS:
23 Yes, that's correct.
24 EXAMINATION BY MR. LONG:
25 Q. And we've already seen that during the 1980s,
26 you were submitting testimony that was contrary to
27 the interest of the tobacco companies, the D.C. City
28 Council; right?
29 A. Yes.
30 Q. Do you think if you had been taking positions
31 publicly on behalf of the tobacco company and knew
32 it or The Tobacco Institute in the 1980s, you would
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18280

1 remember that?
2 A. Yes.
3 MR. MICHAEL GERTLER:
4 Objection.
5 THE WITNESS:
6 Yes.
7 EXAMINATION BY MR. LONG:
8 Q. And to the best of your recollection, you had
9 never worked for a tobacco company or The Tobacco
10 Institute until you were retained to work on these
11 cases in the area of medical screening; correct?
12 A. Yes.

13 Q. Mr. Gertler asked you something about
14 referring to your testimony in Blankenship, whether
15 after you reviewed some more information about
16 potential damage to people's lungs who were younger,
17 he asked you whether you changed your expert report
18 to reflect that.

19 Remember that?

20 A. Yes.

21 Q. Now, does your expert report in any way
22 address whether younger people can have more damage
23 to their lungs from smoking?

24 A. I don't think it does. I don't think there's
25 anything in there, no.

26 Q. And does it address how old you need to be
27 before or how -- Does it address that there's a
28 specific age where damage can start and be worse
29 than others?

30 A. No.

31 Q. I mean, is there anything even close to that
32 in your expert report?

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18281

1 A. No.

2 Q. Your expert report is limited to whether
3 there should be screening techniques for smokers and
4 former smokers for certain diseases; right?

5 A. Yes.

6 Q. So the subject area Mr. Gertler asked you
7 about is not touched upon in your expert report;
8 right?

9 A. That's correct.

10 Q. So why would you change it?

11 A. There would be no reason to change it.

12 Q. Now, Mr. Gertler asked you about several,
13 several articles in the literature that talked about
14 spirometry. Do you remember that?

15 A. Yes.

16 MR. LONG:

17 And may I approach, Your Honor?

18 THE COURT:

19 Yes.

20 EXAMINATION BY MR. LONG:

21 Q. Here's one that he handed you, this 0104.04.
22 That was the first one, the National Lung Health
23 Education Program.

24 A. Yes.

25 Q. What is the National Lung Health Education
26 Program?

27 A. Well, I don't know a lot about this little
28 program. It's a -- My understanding is that it's
29 a group of, a small group of physicians who have
30 gotten together and formed a little program. And
31 they write. But that's all I know about the
32 program.

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18282

1 Q. Okay. Well, let me hand you -- Another one
2 he used was Exhibit 0128.04 from Postgraduate
3 Medicine. Is that an article on behalf of some
4 medical group or association or guidelines or what
5 is that?

6 A. (Witness reviews document.) It looks to me
7 like it's written by two people.
8 Q. So it's not on behalf of some prestigious
9 medical society or anything like that?
10 A. No, it's not.
11 Q. Doctors write articles all the time on their
12 viewpoints that are published in medical treatises;
13 correct?
14 A. That's correct.
15 Q. And here's another one that Mr. Gertler asked
16 you about, Scott Plaintiffs' Exhibit 0096.04. Can
17 you even tell on that particular article who the
18 author is?
19 A. (Witness reviews document.) There's no
20 author.
21 Q. Okay. And here's another one that Mr.
22 Gertler put up, Scott Plaintiffs' Exhibit 0159.04.
23 And who's the author of that article?
24 A. (Witness reviews document.) This -- This
25 is -- Well, let me be sure. It's written by Dr.
26 Petty.
27 Q. Are you familiar with Dr. Petty?
28 A. Yes.
29 Q. Dr. Petty is one of the doctors who has long
30 been a proponent of doing a lot of spirometry;
31 correct?
32 A. Yes.

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18283

1 Q. And there are some small groups of doctors
2 who believe that spirometry should be done more
3 frequently than it really is in daily practice;
4 correct?
5 A. Yes.
6 Q. Now, does that make it the standard of care?
7 Does it make spirometry for smokers and former
8 smokers the standard of care?
9 A. No.
10 Q. Does it make spirometry for smokers and
11 former smokers reasonably necessary according to
12 contemporary scientific principles?
13 A. No.
14 Q. Is there a consensus among the American
15 Thoracic Society, the American College of Chest
16 Physicians, the AMA or the American Academy of
17 Family Physicians that spirometry screening for COPD
18 should be done on former smokers and present
19 smokers?
20 A. No.
21 Q. In fact, does any one of those organizations
22 endorse the position that those tests should be done
23 on former and present smokers?
24 A. Not one of them.
25 Q. On the issue of CT scans and lung cancer,
26 you're familiar -- you were asked about Dr.
27 Henschke's work. You reviewed that work. You were
28 aware of that work in reaching your opinions;
29 correct?
30 A. Yes.
31 Q. Was anything pointed out to you from Dr.
32 Henschke that you hadn't considered before?
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1 A. No.
2 Q. And you're familiar with Dr. Strauss'
3 criticism of the Mayo Clinic study?
4 A. Yes.
5 Q. And you've been familiar with that for a long
6 time?
7 A. Yes.
8 Q. And that is an area of controversy; correct?
9 A. Yes.
10 Q. Now, the National Cancer Institute, they're
11 the main sponsor of these studies going on around
12 the country, including Ochsner, to determine
13 questions such as whether there's a real benefit to
14 screening smokers and former smokers with CT scans;
15 correct?
16 A. Correct.
17 Q. And the National Cancer Institute, they're
18 considered part of the Public Health Service; aren't
19 they?
20 A. Oh, yes. Definitely. They're a major part.
21 Q. And I think, Doctor, you've served for the
22 Public Health Service; correct?
23 A. Yes, sir.
24 Q. And is it correct to say that the number one
25 job of the Public Health Service is to protect the
26 public health?
27 A. Yes. That would be correct.
28 Q. And if there is a dispute or a controversy on
29 a public health issue, doesn't the Public Health
30 Service pretty much have a mandate to always come
31 down on the side of protecting the health of the
32 public?

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18285

1 A. Oh, yes. That's what they do.
2 Q. But it's the Public Health Service,
3 particularly the National Cancer Institute, that's
4 calling for these tests to be done to determine
5 whether CT screening for smokers and former smokers
6 has benefits that outweigh its harm; correct?
7 A. Correct.
8 Q. And at the present time, it's this Public
9 Health Service, the National Cancer Institute, that
10 is telling the public and telling doctors that right
11 now they do not recommend screening present and
12 former smokers with CT scans for lung cancer outside
13 the controlled clinical trials that they're
14 conducting?
15 A. That's correct. The Public Health Service is
16 not recommending it.
17 Q. And according to any Public Health Service,
18 it's not recommended; correct?
19 A. Correct.
20 Q. And CT scans for smokers and former smokers
21 are not the standard of care anywhere; are they?
22 A. That is correct.
23 Q. And CT scans for present and former smokers
24 are not reasonably necessary according to
25 contemporary scientific principles anywhere; are
26 they?

27 A. That's correct.
28 MR. LONG:
29 Thank you very much, Doctor. No more
30 questions.
31 THE COURT:
32 You may step down.
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18286

1 THE WITNESS:
2 Thank you, sir. I appreciate that.
3 THE COURT:
4 We'll recess until 9:30 tomorrow
5 morning. We're coming back. You don't have
6 to come back.
7 THE WITNESS:
8 Thank you.
9 THE COURT:
10 9:30 tomorrow. Thank you for coming
11 this morning in the inclement weather. I
12 think the weather is going to get better but
13 colder. So we'll see you at 9:30 tomorrow
14 morning.
15 (Whereupon the jury is excused at this
16 time.)
17 MR. RUSS HERMAN:
18 Your Honor, may it please The Court,
19 Your Honor, I have some matters for the
20 record before we adjourn.

21 THE COURT:
22 I intended to solicit that. And I have
23 some other matters I wish to discuss.
24 So anything for the record by
25 plaintiffs' counsel before we recess?

26 MR. RUSS HERMAN:
27 Yes, Your Honor.
28 With respect to Exhibit 0047.04 that
29 Your Honor had previously ruled not
30 admissible on redirect, Counsel for
31 defendants, Mr. Long, established the
32 foundation by specifically asking this

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18287

1 witness if this was the testimony which he
2 gave in D.C. before that organization, and
3 the witness said, "Yes." And then he asked
4 the witness: So I'm correct in the 1980s you
5 were testifying against the interests of
6 tobacco?

7 Now, he can't -- Most respectfully, we
8 ask Your Honor to reconsider, to reconsider
9 your ruling because now on redirect, the
10 defendants have used this document for their
11 own purposes. It not only makes it relevant,
12 but the foundation for it is firmly
13 established by the defendants.

14 THE COURT:
15 I will review the transcript and revisit
16 my ruling, if I think it's appropriate.

17 MR. WITTMANN:
18 Your Honor, --
19 THE COURT:

20 Just a moment. Let's have some order
21 here, please.
22 Mr. Herman, are you finished talking for
23 the record on behalf of the plaintiffs from
24 today's proceedings?
25 MR. RUSS HERMAN:
26 No, I'm not, sir.
27 THE COURT:
28 You may continue.
29 MR. RUSS HERMAN:
30 We will follow Your Honor's and The
31 Special Master's orders to the letter
32 regarding tomorrow morning. Since we
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18288

1 anticipate Dr. Eiswirth will testify, they'll
2 have tomorrow morning a list of cross
3 documents and the documents in the proposed
4 order.

5 I'm advised that Mr. Viscusi, Professor
6 Viscusi, will not testify till Thursday. We
7 will have a list of his documents in order by
8 9:00 o'clock Thursday.

9 We also indicate that the 48-hour rule
10 appears and we were not furnished the Viscusi
11 documents until noon today, as will be
12 evidenced by the filing in the court record.
13 And right now we make note that a large
14 number of those documents are not on his
15 reliance list and we will be bringing a
16 Daubert motion to The Court in the morning on
17 bias, methodology, and lack of qualification
18 to give some of the opinions.

19 We shall also challenge his
20 demonstratives that we were served with, some
21 of which we were just served with today, on
22 the basis that they are not borne out by the
23 supporting documents.

24 THE COURT:
25 Anything else by plaintiffs' counsel?

26 MR. RUSS HERMAN:
27 No, Your Honor.

28 THE COURT:
29 Defense counsel?

30 MR. LONG:
31 My only point on Mr. Herman's statement
32 that somehow I authenticated this, the

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18289

1 objection -- the letter that Dr. Spagnolo
2 wrote to the D.C. Council about his views on
3 smoking issues, he's testified to all that on
4 direct. That letter remains hearsay and
5 remains inadmissible.

6 I mean, he testified on direct that he
7 presented this stuff to the D.C. Council, and
8 that's what I was referring to in my
9 questions. It's no more admissible after
10 redirect than it was before redirect.

11 MR. RUSS HERMAN:
12 Wait just one moment. How can it be

13 hearsay if he's subject to cross-examination
14 on it? It's his words.
15 THE COURT:
16 I said that I would look at the
17 transcript and I'll revisit my ruling.
18 MR. RUSS HERMAN:
19 Thank you, Your Honor.
20 THE COURT:
21 Anything else by defense counsel?
22 MR. WITTMANN:
23 Yes, Your Honor.
24 I was served after lunch with a subpoena
25 duces tecum to appear in court tomorrow
26 morning at 10:00 a.m. with a list of some 32
27 categories of documents relating to the
28 expert report of Kip Viscusi, which is dated
29 July 7th, 2000.
30 And it appears from looking at the
31 subpoena duces tecum that the plaintiffs are
32 simply attempting to reopen discovery with
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18290

1 respect to Viscusi. And since I haven't got
2 much time to deal with this, I move now
3 orally to quash the subpoena. I certainly
4 haven't got time to do this overnight, to
5 comply with it.

6 And I submit that the request of the
7 subpoena coming at this late date in the
8 middle of trial is two years past the
9 discovery deadline, just for openers. And
10 it's an improper effort to go conduct
11 discovery mid trial.

12 MR. WILLIAMS:

13 Your Honor, Brown & Williamson joins in
14 on that, Your Honor.

15 MR. RUSS HERMAN:

16 I'd like to briefly respond to that.

17 THE COURT:

18 I'm not interested in people competing
19 for my attention.

20 Mr. Wittmann, have you finished?

21 MR. WITTMANN:

22 That's it. Yes, Your Honor.

23 THE COURT:

24 Anything else by defense counsel before
25 we recess for today?

26 Mr. Williams?

27 MR. WILLIAMS:

28 Brown & Williamson joins in on that.

29 Brown & Williamson was served with a similar
30 subpoena. Extensive, voluminous documents
31 were requested. And we join in on Mr.

32 Wittmann's objection to it and move to quash
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18291

1 it.

2 THE COURT:

3 I will consider all of that when the
4 return is called for. It is at, you say,
5 10:00 o'clock tomorrow morning?

6 MR. WITTMANN:
7 Yes, Your Honor.
8 MR. RUSS HERMAN:
9 I'd like you to know, however, that I
10 did meet with Mr. --
11 THE COURT:
12 I will hear the motions and make a
13 decision when the return is called for.
14 MR. RUSS HERMAN:
15 Thank you, Your Honor.
16 THE COURT:
17 Anything else before we recess?
18 Mr. Gianna, did you --
19 THE SPECIAL MASTER:
20 No.
21 THE COURT:
22 Okay. We'll recess until 9:30.
23 MR. WITTMANN:
24 Thank you, Your Honor.
25 (Whereupon the proceedings were
26 adjourned at 4:15 o'clock p.m.)
27 * * * * *
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18292

1 REPORTER'S CERTIFICATE
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6 I, CHERYL FOURNET HUFFMAN, Registered Merit
7 Reporter, in and for the State of Louisiana, as the
8 officer before whom this testimony was taken, do
9 hereby certify that this testimony was reported by
10 me in the stenotype reporting method, was prepared
11 and transcribed by me or under my personal direction
12 and supervision, and is a true and correct
13 transcript to the best of my ability and
14 understanding; that I am not related to counsel or
15 to the parties herein, nor am I otherwise interested
16 in the outcome of this matter.
17
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